

No. 14424

United States
Court of Appeals
for the Ninth Circuit

CASH COLE, et al.,

Appellants,

vs.

FAIRVIEW DEVELOPMENT, INC., et al.,

Appellees.

Supplemental
Transcript of Record

Appeal from the United States District Court
for the District of Alaska,
Fourth Division

FILED

MAR 21 1955

PAUL P. O'BRIEN, CLERK

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CASH COLE, et al.,

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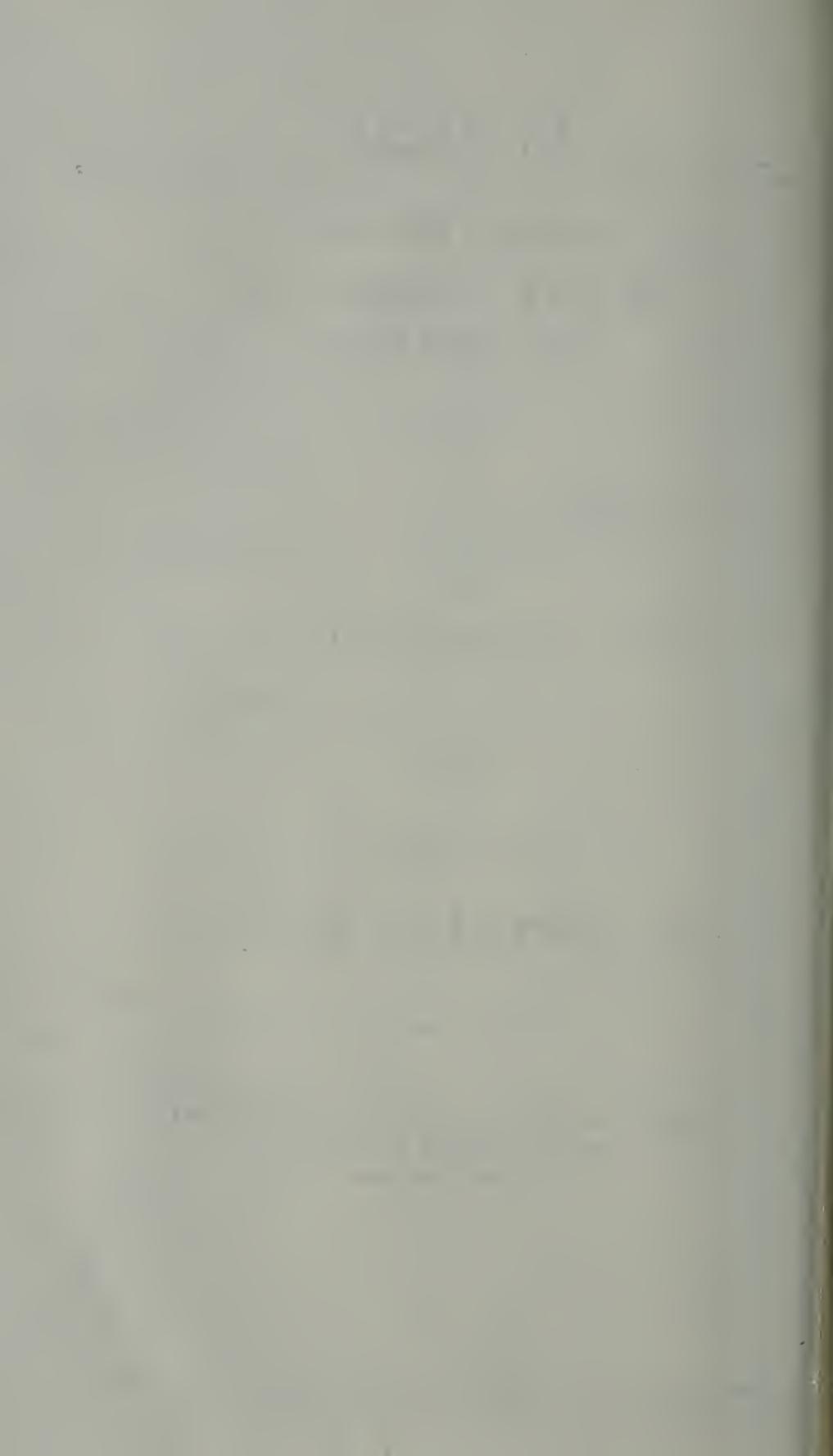
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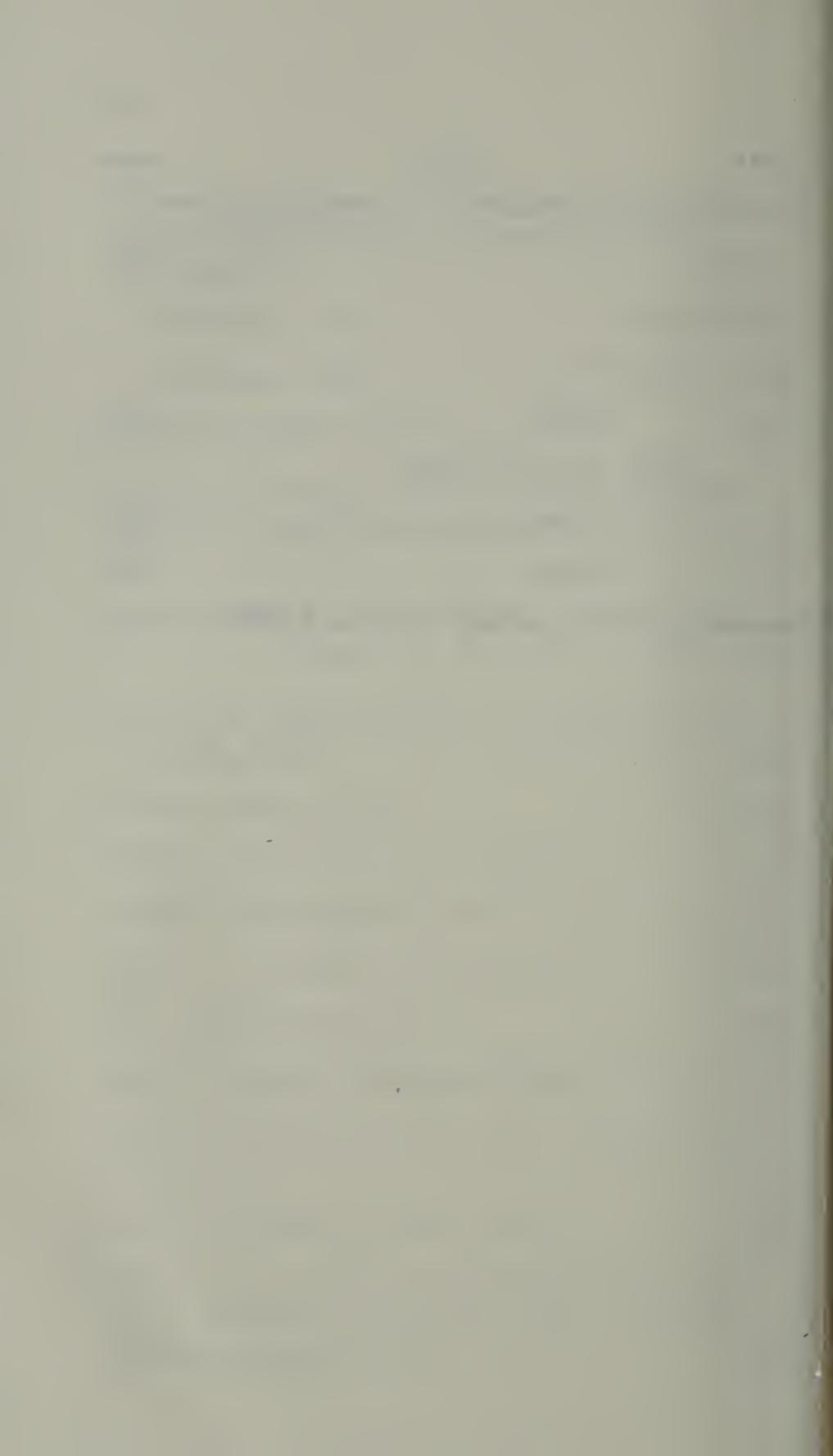
[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court for the Territory of
Alaska, Fourth Division

No. 7298

FAIRVIEW DEVELOPMENT, INC., an Alaska Corporation; NELSE MORTENSEN, Cliff MORTENSEN and FRANK V. HENDERSON, Individually and as Directors and Stockholders of Fairview Development, Inc., and for and on Behalf of All Other Stockholders of Fairview Development, Inc.,

Plaintiffs,

vs.

CASH COLE, Individually and as an Officer and Director of Bayview Realty, Inc., an Alaska Corporation, and Fairview Development, Inc.; EVERETT NOWELL, Individually and as an Officer and Director of Bayview Realty, Inc., and Fairview Development, Inc.; BAYVIEW REALTY, INC., an Alaska Corporation; FIRST NATIONAL BANK OF FAIRBANKS, a Corporation, and BANK OF FAIRBANKS, a Corporation,

Defendants.

APPEARANCE

Come Now the following defendants: Cash Cole, individually and as an Officer and Director of Bayview Realty, Inc., an Alaska corporation, and Fairview Development, Inc.; Everett Nowell, individually and as an officer and director of Bayview

tiff corporation by said receiver until further order of this court.

In support of said motion said plaintiffs have filed herewith an affidavit of Cliff Mortensen.

Dated at Fairbanks, Alaska this 25th day of June, 1953.

COLLINS & CLASBY,

By /s/ WALTER SCZUDLO.

Affidavit of service by mail attached.

[Endorsed]: Filed June 25, 1953.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF PLAINTIFFS'
MOTIONS FOR APPOINTMENT OF RE-
CEIVER AND TEMPORARY INJUNC-
TION

State of Washington,
County of King—ss.

The undersigned, Cliff Mortensen, being first duly sworn upon oath deposes and says as follows:

1. That he is a citizen of the United States and the State of Washington; that he is over the age of twenty-one years and *sui juris*.

2. That he is one of the plaintiffs in the above-entitled cause, and that said cause was filed by Fairview Development, Inc., an Alaska corporation; Nelse Mortensen, the undersigned, and Frank V. Henderson, individually and as Directors and Stockholders of Fairview Development, Inc., and

for and on behalf of all other stockholders of Fairview Development, Inc., because of the deadlock in the conduct or management of the affairs of the plaintiff corporation, Fairview Development, Inc., due to failure of the board of directors to proceed; deadlock among the stockholders and members of the board of directors resulting in deadlock and paralysis of corporate functions; dissention and discord as to who in fact comprise the board of directors; mismanagement and improper disposition of funds and dissipation of assets, and impairment of said corporation property by one or more of the principal defendants in the above-entitled cause.

3. That the plaintiff, Fairview Development, Inc., is a corporation duly organized and existing under and by virtue of the laws of the Territory of Alaska.

4. That the plaintiff, Fairview Development, Inc., was organized for the purpose of obtaining a Federal Housing Administration insured loan to provide funds for the construction of a large apartment housing project in Fairbanks, Alaska. Said plaintiff corporation obtained an insured mortgage loan for the construction of such apartment housing project now known as Fairview Manor, situated in Fairbanks, Alaska, upon lands leased by the plaintiff corporation from the City of Fairbanks for a term of 75 years, and did construct said housing project.

5. That the plaintiffs, Cliff Mortensen, Nelse Mortensen and Frank V. Henderson are stockhold-

the plaintiff corporation, Fairview Development, Inc., the funds received by them from rentals and other income from said project; and have failed to account for such funds belonging to the plaintiff corporation to its board of directors, or to obtain the approval of said board of directors for withdrawal of said funds for their own benefit or for the payment of salaries and expenses to themselves.

f. Have failed to secure authority and approval of the board of directors of said plaintiff corporation, as to any salaries taken by them or the free rental of their apartments, or the approval of extraordinary disbursements or expenses or costs, or determination of corporate policies or exercise of corporate powers.

g. Have taken to themselves the operation, management and direction of the property of the plaintiff corporation, Fairview Development, Inc., or the determination of corporate policies, or the exercise of corporate powers.

h. Have failed, or neglected, or refused to call or hold any annual meeting of the stockholders as required by the bylaws of the corporation.

i. Have refused to permit any record or minutes of meetings of board of directors to be kept or proper action to be taken therein.

j. Have done other acts and taken other actions without authority of the board of directors of said plaintiff corporation which are detrimental to the interests of said corporation, its stockholders in general and the plaintiffs in particular.

8. That the acts and actions of said defendants hereinabove mentioned have operated to the detriment, loss and damage of the plaintiff corporation, Fairview Development, Inc., and the individual plaintiffs as stockholders of said corporation; that such acts and actions are contrary to the general laws of the Territory of Alaska, or the articles of incorporation, or the bylaws of said plaintiff corporation; and that such acts and actions are contrary to the provisions, terms and conditions of a certain agreement dated June 16, 1950, as more fully alleged in paragraphs XI and XII of the complaint filed herein.

9. That the defendants, First National Bank of Fairbanks, and Bank of Fairbanks, have on deposit funds of Fairview Development, Inc., which will be dissipated and expended without authority, or for the personal use and benefit of the defendants, Cash Cole and Everett Nowell, or either of them, without the authority of the board of directors, or the stockholders of Fairview Development, Inc., and said money will be used for other than corporate purposes, all to the damage of the plaintiff corporation, Fairview Development, Inc., and the stockholders of said plaintiff corporation, unless said defendant banks are restrained and enjoined from disbursing said funds upon the orders or direction of the defendants, Cash Cole, or Everett Nowell, or Bayview Realty, Inc., or any of them acting alone or in concert.

10. That although the plaintiff Fairview Development, Inc., is fully solvent, a deadlock exists on the board of directors of said corporation and among the stockholders of said corporation on matters vitally affecting the welfare and best interests of said corporation; that the officers and directors of said plaintiff corporation are unable to agree upon matters affecting the life or affairs of said corporation; that the common stock ownership is evenly divided between opposing factions and an impasse exists between such factions both on the board of directors thereof and among the stockholders thereof. No decision or action can be taken or had by the plaintiff Fairview Development, Inc., for the protection of its assets and property for the benefit of all stockholders by reason of said deadlock.

11. That the property and assets of the plaintiff corporation are presently being dissipated and lost by reason of said deadlock on said board of directors and among the stockholders; that irreparable injury and damage will be done to the plaintiff, Fairview Development, Inc., and the plaintiffs Cliff Mortensen, Nelse Mortensen and Frank V. Henderson, and all stockholders of the plaintiff corporation unless this court intervenes for their protection.

12. Pursuant to the prayer contained in the complaint filed in the above-entitled cause, and under the general laws of the Territory of Alaska, the plaintiffs, jointly and severally are entitled to the

appointment of a receiver for the property of said corporation, Fairview Development, Inc., to collect the rents, issues, income and profit thereof during the pendency of this action and until final decree of this court, and to protect and preserve said property and the interests of said corporation and the interests of all of the stockholders of said corporation; and to the entry of a temporary injunction restraining and enjoining said defendants, Cash Cole and Everett Nowell and Bayview Realty, Inc., as prayed for in the complaint filed herein.

Dated at Seattle, Washington, this 22nd day of June, 1953.

/s/ CLIFF MORTENSEN.

Subscribed and sworn to before me this 22nd day of June, 1953.

[Seal] /s/ JOSEPH DIAMOND,
Notary Public in and for the
State of Washington.

My commission expires: Jan. 25, 1954.

Affidavit of service by mail attached.

[Endorsed]: Filed June 25, 1953.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO PLAINTIFFS' MOTION FOR APPOINTMENT OF RECEIVER AND TEMPORARY INJUNCTION

State of Washington,
County of King—ss.

The undersigned, Everett Nowell, being first duly sworn of oath, deposes and says:

1. That he is a citizen of the United States and of the Territory of Alaska; that he is over the age of twenty-one years and *sui juris*.
2. That he is one of the defendants in the above-entitled cause.
3. That he has read the Affidavit of Cash Cole, one of the defendants in the above-entitled cause, is familiar with the contents thereof and knows the same to be true.
4. That he hereby incorporates and adopts the affidavit of Cash Cole, above referred to as his own and by this reference makes it a part hereof as if the same were set out in full herein.
5. That the individual plaintiffs herein, namely: Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, as builders and contractors contrary to their agreements and responsibilities, allowed the following liens to be placed against the said housing project:
 - a. Lien claim of A. G. Rushlight & Co., a corporation, in the sum of Three hundred fifty-six thousand four hundred three & 85/100 (\$356,403.85)

Dollars plus interest and costs, filed December 19, 1951.

b. Lien claim of Clem Pilip, d/b/a Pilip Company, in the sum of Seventy-seven thousand six hundred eighty-one & 62/100 (\$77,681.62) Dollars plus interest and costs, filed January 21, 1952.

c. Lien claim of C. H. Keaton, d/b/a Keaton Paint Company in the sum of Seventeen thousand three hundred thirty-nine & 44/100 (\$17,339.44) Dollars plus interest and costs, filed February 16, 1952.

d. Lien claim of Pilip & Butt Painting Contractors, Inc., in the sum of Seventy-seven thousand six hundred eighty-one & 62/100 (\$77,681.62) Dollars plus interest and costs, filed March 3, 1952.

That the allowance of said liens being filed has placed the ownership of said project in jeopardy, has endangered the good relationship with the loaning institutions and has in general endangered the success of the entire corporation.

Dated at Seattle, Washington, this 3rd day of August, 1953.

/s/ EVERETT NOWELL.

Subscribed and sworn to before me this 3rd day of August, 1953.

[Seal] /s/ JOHN E. HEDRICK,
Notary Public in and for the State of Washington,
Residing at Seattle.

Affidavit of service by mail attached.

[Endorsed]: Filed August 4, 1953.

[Title of District Court and Cause.]

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, deposes and says that the attached document is a true copy of the minutes of a special meeting of the Board of Directors of Fairview Development, Inc., held on the 3rd day of August, 1951.

/s/ CASH COLE.

Subscribed and sworn to before me this 7th day of August, 1953.

[Seal] /s/ ARNOLDINE R. SCOTT,
 Notary Public in and for the
 Territory of Alaska.

My commission expires March 31, 1956.

Minutes of Special Meeting of Board of Directors
of Fairview Development, Inc.

A special meeting of the Board of Directors of Fairview Development, Inc., a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, was duly and regularly held pursuant to notice at Fairbanks, Alaska, on the 3rd day of August, 1951, at the hour of 10:00 a.m. in the forenoon of the said day, at which meeting the following named, being all the directors of said corporation, were personally present, to wit: Everett Nowell, Cash Cole and Cliff Mortensen.

Everett Nowell presided and Cash Cole acted as Secretary of the meeting. Mr. Everett Nowell stated that the primary purpose of the special meeting of the Board of Directors of Fairview Development, Inc., was making and settling the arrangement for the management of the property of Fairview Development, Inc. He explained that the apartment units owned by Fairview Development, Inc., were being completed and several of them had been completed, that tenants were being contacted for the purpose of leasing and moving in said apartment units, that thus far several apartment units had been leased and occupied by tenants, that it has been since the beginning of the organizing of Fairview Development, Inc., the intent of all the stockholders that the management of the property should be given to Bayview Realty, Inc., an Alaska corporation, of which Cash Cole and Everett Nowell are the owners and that it has been the intent of all interested parties that Cash Cole and Everett Nowell could dissolve Bayview Realty, Inc., as a corporation and operate personally, but that either Bayview Realty, Inc., or Cash Cole and Everett Nowell as individuals, should have the management of the properties of Fairview Development, Inc., that it has been the intent of all interested parties that the managing agent should completely manage the property and receive therefor a 5% fee of the total income with a guarantee of not less than Two Thousand Dollars per month; that the purpose of this meeting was to effectuate the past contracts

and adopt a proper resolution to place said understanding and contracts in effect. That thereupon Mr. Cash Cole as Secretary-Treasurer of the corporation, read the following resolution:

Resolution:

“Whereas, this corporation has heretofore had certain contractual relations and understandings with Bayview Realty, Inc., a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, and

“Whereas, Bayview Realty, Inc., an Alaska Corporation, is owned solely by Cash Cole and Everett Nowell, and

“Whereas, Bayview Realty, Inc., and Cash Cole and Everett Nowell are in the business of managing real property, and

“Whereas, it is to the best interests of this corporation, Fairview Development, Inc., to have its properties properly managed, and

“Whereas, it is the desire of the directors of this corporation to utilize the abilities, capacities, energies and skills of Bayview Realty, Inc., and Cash Cole and Everett Nowell; now, therefore,

“Be It Resolved that this Company execute with Bayview Realty, Inc., a contract containing, among other things, the following provisions:

“1. That Bayview Realty, Inc., shall use its best efforts and energies in assuming and carrying on the complete property management of the property of Fairview Development, Inc., that among the duties assumed by Bayview Realty, Inc., will be the following, but not limited to the following: Collect

all monies, incur all bills, pay all bills by check, without counter signature, carry on generally the management of the properties of Fairview Development, Inc., in the manner now being conducted by it in said management, deposit all monies collected under the name of Fairview Development, Inc., follow and keep current the bookkeeping system installed and devised by Mr. Lofquist, an account of Pritchard & Lofquist, Exchange Building, Seattle, Washington.

“2. That Fairview Development, Inc., pay to Bayview Realty, Inc., a fee of 5% of the total income of Fairview Development, Inc., with a minimum guarantee of not less than \$2,000.00 per month and that all expenses incurred by Bayview Realty, Inc., including such fee, be paid from the general receipts of Fairview Development, Inc.

“3. That the sole owners of Bayview Realty, Inc., that is, Cash Cole and Everett Nowell, may dissolve Bayview Realty, Inc., and operate Bayview Realty, Inc., as individuals, that in such case the provisions herein provided for shall run to the two named individuals.”

Following the reading of the above resolution, Mr. Cliff Mortensen moved that the said resolution be adopted, whereupon a vote was taken of all directors present and it was unanimously decided to adopt the said resolution.

Then Mr. Cash Cole stated that it was the understanding of all the directors of Fairview Development, Inc., that all profits of Fairview Development, Inc., should be made available to the stock-

holders of Fairview Development, Inc., as dividends at the end of each year. That the stockholders could draw their dividends or leave them with the corporation as they saw fit.

Thereupon Mr. Cash Cole offered the following resolution:

Resolution:

“Whereas, it is the intent of all stockholders to realize a profit from their investment in this corporation, and

“Whereas, it is the desire of the stockholders to realize cash income yearly from said investment, now, therefore,

“Be It Resolved that all profits of Fairview Development, Inc., shall be used as dividends of the capital stock of such corporation and be made available to the stockholders at the end of each fiscal year.”

The said resolution was, upon a vote taken, unanimously adopted.

There being nothing further to come before the meeting, the motion for adjournment was made and adopted.

/s/ EVERETT NOWELL,
President.

Attest:

/s/ CASH COLE,
Secretary.

Receipt of copy acknowledged.

[Endorsed]: Filed August 7, 1953.

[Title of District Court and Cause.]

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, deposes and says that the attached document is a true copy of an agreement entered into December 1, 1951, between Fairview Development, Inc., an Alaska corporation, and Bayview Realty, Inc., an Alaska corporation.

/s/ CASH COLE.

Subscribed and sworn to before me this 7th day of August, 1953.

[Seal] /s/ ARNOLDINE R. SCOTT,
 Notary Public in and for the
 Territory of Alaska.

My commission expires March 31, 1956.

Agreement

This Agreement, made and entered into this 1st day of December, 1951, by and between Fairview Development, Inc., a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, hereinafter termed and designated "The Owner," and Bayview Realty, Inc., a corporation organized under the laws of the Territory of Alaska, hereinafter termed and designated "The Agent."

Witnesseth:

Whereas, the Owner is the Owner of that certain property known as Fairview Manor, situate in the Town of Fairbanks, Alaska, and has agreed to engage the services of the Agent as sole agent in the manner and upon the terms hereinafter set forth, now, therefore,

In Consideration of the Premises and of the Sum of One Dollar and of Other Good and Valuable Considerations, the Receipt of Which Is Hereby Acknowledged, the Parties Hereto Have Agreed as Follows, to wit:

First: The Owner does hereby employ and retain the Agent as sole agent for and in connection with the management and operation of that certain project, in said Town of Fairbanks, Alaska, commonly known as the "Fairview Manor Project" for the term commencing the first day of December, 1951, and ending the first day of December, 1984.

Second: The Agent shall and will collect any and all rents or other monies due or to become due in connection with said premises or any part thereof; it shall lease all or any part thereof at the best price obtainable under existing conditions and it shall maintain and cause to be maintained, said premises in good order and repair and make such expenditures or cause the same to be made as may be or become necessary from monies collected, so as to assure proper maintenance and operation thereof.

Third: It is understood and agreed that the Agent, shall employ all necessary help, make all necessary

purchases as may be necessary in the premises, contract for and cause to be made all repairs and pay all expenses incurred in connection with the operation and maintenance of said premises and buildings.

Such expenses shall be deducted monthly and vouchers therefor shall accompany each monthly statement.

Fourth: The Agent shall render monthly to the Owner a statement which shall show all income and disbursements.

Fifth: It is expressly understood and agreed that all applications for space in said project, or any part thereof, are to be referred to the Agent, it being understood that all leases and other arrangements for the occupancy of any space in said project or buildings, or portions thereof, shall be referred to and closed by said Agent and by no one else.

Sixth: The Agent is hereby authorized and shall have power and authority to take any action at law or in equity, which it shall deem necessary or appropriate for the purpose of enforcing collection of moneys due from tenants or to repossess any portion of the premises, in the event conditions should make it necessary to repossess any portion of the premises.

Seventh: The Agent shall render to the Owner bills for all assessments, taxes and water which may be levied by constituted authority against said premises.

Eighth: The Owner agrees to pay to the Agent five per cent of the amount of all monies collected as rentals. Said five per cent to be deducted each month as part of the expenses incurred in the management and operation of said premises, provided that five per cent of such rentals shall amount to \$2,000.00 or more per month, and if such be not the case in any one month, then said Agent shall nevertheless be paid the sum of \$2,000.00 and the difference between five per cent of said rental and \$2,000.00 shall be made up out of the total rents collected during any one month.

Ninth: It is hereby understood by the parties hereto that Bayview Realty, Inc., an Alaska corporation, is wholly owned by Cash Cole and Everett Nowell. That upon their decision and discretion they may dissolve Bayview Realty, Inc., as a corporation and take over the assets and liabilities of such corporation personally. That all rights and conditions of this contract shall in such event of dissolution be binding on and in favor of Cash Cole and Everett Nowell as individuals.

Tenth: And finally it is agreed between the Owner and the said Agent that all moneys received from rentals of said premises shall be applied as follows:

(a) To the payment of all expenses incurred in connection with the management and operation of said project and premises, including, but not limited to, wages, repairs, replacements, taxes, impositions and compensations of said Agent as set forth in paragraph Eight.

(b) Payment of monthly sum of
to the National Bank of Commerce of Seattle,
Washington, in accordance with provisions of a
certain indenture of mortgage, dated the day
of June, 1950, reference to which is hereby made,
and any balance remaining shall be deposited to the
account of Fairview Development, Inc., to be used
as profits according to the agreement of the owners
of the stock of such Fairview Development, Inc.

In Witness Whereof, the said parties have caused
these presents to be executed by their respective
officers, pursuant to a resolution duly adopted by
their respective Board of Directors, this 1st day of
December, 1951.

[Seal] FAIRVIEW DEVELOPMENT,
INC.,

By /s/ EVERETT NOWELL,
President;

/s/ CASH COLE,
Vice-President;

.....
Secretary.

[Seal] BAYVIEW REALTY, INC.,

By /s/ EVERETT NOWELL,
President;

/s/ CASH COLE,
Secretary.

Receipt of copy acknowledged.

[Endorsed]: Filed August 7, 1953.

[Title of District Court and Cause.]

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, deposes and says that the attached is a true copy of a letter sent to Institutional Securities, c/o Seattle Trust and Savings Bank, and Federal Housing Administration, Juneau, Alaska, dated March 18, 1953.

Said Institutional Securities has a F.H.A. guaranteed mortgage in the sum of \$3,080,000 on the property known as Fairview Manor, owned by Fairview Development, Inc., located at Fairbanks, Alaska.

The attached letter is the document referred to in a letter from J. F. Campbell, Vice President and Manager of the Mortgage Loan Department of the Seattle Trust and Savings Bank, Seattle, Washington, on Page 7 in an affidavit of the undersigned in opposition to Plaintiffs' motions for appointment of receiver and temporary injunction.

/s/ CASH COLE.

Subscribed and sworn to before me this 7th day of August, 1953.

[Seal] /s/ ARNOLDINE R. SCOTT,
 Notary Public in and for the
 Territory of Alaska.

My Commission expires March 31, 1956.

March 18, 1953.

Institutional Securities,
c/o Seattle Trust & Savings Bank,
Seattle, Washington, and
Federal Housing Administration,
Juneau, Alaska.

Re: Fairview Manor.

Gentlemen:

We have now completed our first year of operation and as a result of the severe climatic conditions and limited public utilities in the area, numerous changes and improvements have had to be made and must be made to the project in order to safeguard the property and protect the occupants. Improvements that have already been made and paid for from rental income are as follows:

1. To eliminate the continuous usage of the four 15 H.P. water pumps, four 1 and 1½ water pumps were installed	\$ 3,146.26
2. Sixty fire extinguishers	1,461.24
3. Thirty-two fire hose racks.....	1,565.49
4. Thirty-two fire hoses.....	571.40
5. Fire ropes	108.67
6. In order to reduce noise in the hot water system, silent-checked valves were installed	300.00

7. Additional safety controls were added to all boilers at the request of the Fire Underwriters.....	243.64
8. To eliminate misusage of laundry equipment, 32 coin meters were installed on equipment	1,032.05
9. Additional laundry trays were installed in all laundry rooms.....	1,048.10
10. Storm windows and ventilating and heating water pipes in garage areas.	3,500.00
11. Roof fences in all buildings to prevent ice from forming on roofs.....	5,000.00
12. Real estate taxes levied during construction	31,612.00
13. Interest on mortgage: Due January 1, 1952\$9,075.26 30 days delinquent interest 30.25 Due February 1, 1952.... 9,194.76	18,300.27
14. One Chevrolet truck, one Ford truck, one International dump truck and one tractor purchased to provide snow and ash removal.....	8,207.34
15. Project warehouse	9,708.89
16. Power house and plant (Two 50 K.W. Diesel generators).....	22,340.44
17. Cover and insulate exposed heating pipes in front hallways to prevent freezing	2,000.00
18. Connect fire hoses to water system..	3,600.00
Total	\$113,745.79

In addition to the above improvements and expenditures we must immediately proceed with the following in order to preserve the property and maintain an efficient operation:

1. Install additional insulation in all attic areas to prevent heat loss and roof icing	\$ 7,500.00
2. Drill and install a second well for the safety of the project.....	15,000.00
3. Correct surface drainage around all entrance walks to prevent heaving and cracking and repair walks.....	9,500.00
4. Additional pipe insulation to prevent sweating	6,500.00
5. Replace aluminum roofing where damaged by ice removal.....	25,875.00
<hr/>	
Total	\$64,375.00

The project has operated at a high rate of occupancy. However, we have not been able to accumulate reserves adequate to meet the cost of these much needed improvements. We are requesting that you permit the withdrawal of our reserve for replacement fund and that you waive the monthly contribution to this account for one year. We feel that with this assistance and with what we are able to accumulate out of rental income, we shall have sufficient funds to pay for all this necessary work.

Your early reply will be greatly appreciated as

this type of work must be done before the large construction jobs commence in the area.

Very truly yours,

FAIRVIEW DEVELOPMENT,
INC.,

By
President;

By
Secretary.

CC:as

cc: Federal Housing Administration.

Receipt of copy acknowledged.

[Endorsed]: Filed August 7, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF CLIFF MORTENSEN IN
OPPOSITION TO AFFIDAVITS OF CASH
COLE AND EVERETT NOWELL, DATED
AUGUST 3, 1953

State of Washington,
County of King—ss.

Cliff Mortensen, being first duly sworn on oath, deposes and says: That he is a citizen of the United States and of the State of Washington, over the age of twenty-one years, competent to be a witness in the above-entitled action and one of the plaintiffs above named. That he is further an officer and

director of Fairview Development, Inc., That he makes this affidavit in opposition to the affidavits of Cash Cole and Everett Nowell, each dated August 3, 1953, purporting to have been subscribed and sworn to by the said Everett Nowell and Cash Cole before John E. Hedrick, Notary Public in and for the State of Washington, residing at Seattle. That he has read the said affidavits of the said Cash Cole and the said Everett Nowell.

1. That in the first instance Fairview Development, Inc., was organized by Everett Nowell and Cash Cole for the purpose of obtaining a lease upon a tract of land situated in Fairbanks Recording Precinct and erecting an apartment project thereon. That Nowell and Cole are not and were not builders or contractors and had neither requisite skill, knowledge or construction ability, nor the capital and financial standing to enable them either by themselves or by said corporation to obtain such lease and construct the apartment project. That Nowell and Cole accordingly came to affiant and Nelse Mortensen and Frank V. Henderson and proposed that the latter three become financially interested in Fairview Development, Inc., and that said corporation obtained a lease from the City of Fairbanks, an FHA insured mortgage loan in the amount of \$3,080,000, and constructed a 272-unit apartment project on these leased lands. That affiant and Nelse Mortensen and Frank V. Henderson were at first unwilling to become interested in said corporation, Fairview Development, Inc., on any basis

other than having the controlling interest in said corporation and control on the Board of Directors thereof. That when the parties were first negotiating in said project, it was upon the basis of Cliff Mortensen, Nelse Mortensen and Frank V. Henderson owning $\frac{2}{3}$ of the stock of Fairview Development, Inc., and Everett Nowell and Cash Cole owning $\frac{1}{3}$ thereof and the Mortensens having control on the Board of Directors of said corporation. That the negotiations between the parties were finally concluded upon the basis of the common stock of Fairview Development, Inc., being owned 50% by Bayview Realty, Inc., and 50% by affiant, Nelse Mortensen and Frank V. Henderson. It was further agreed that there would be three members on the Board of Directors of said corporation and that the directors were to be Cash Cole, Everett Nowell and Cliff Mortensen. It was further agreed between the parties as evidenced by a certain agreement, dated June 16, 1950, that Nowell and Cole, acting for themselves, and Bayview Realty, Inc., would together have one vote on the Board of Directors and that Cliff Mortensen acting for himself and Nelse Mortensen and Frank V. Henderson would have one vote on the Board of Directors, and that in the event of the inability of the parties to agree on matters affecting the welfare of the corporation and action to be taken by the Board, the matter would be referred to Ken Kadow of Juneau, Alaska, for his decision or in the event he was not available, then to Roy Sumpter for his decision and that the decision of the said Kadow

of Juneau, Alaska, or Sumpter of Seattle, Washington, on said matters in which Nowell and Cole, on the one hand, and the Mortensens and Henderson, on the other hand, were in disagreement would be binding upon all parties to said voting agreement.

That almost from the inception of the project, there has been disagreement and conflict between Cole and Nowell acting for themselves and/or Bayview Realty, Inc., on the one hand and Cliff Mortensen, Frank V. Henderson and Nelse Mortensen on the other hand on matters pertaining to corporate affairs. That Cole and Nowell conceive of Fairview Development, Inc., as their own project to be operated for their sole benefit, financially and otherwise, and refuse to recognize the rights of Nelse Mortensen, Frank V. Henderson and Nelse Mortensen on and to the corporate assets and corporate affairs. That Cole and Nowell have run said project for their individual benefits and as they themselves see fit without consulting the Mortensen interests and in numerous instances without advising the Mortensen interests of the action they have taken. That they have consistently held what purport to be meetings relating to the corporate affairs, either Directors' meetings or stockholders' meetings, without notice to Cliff Mortensen, Nelse Mortensen and Frank V. Henderson or either of them and have failed to keep accurate records and accounts of the proceedings of said meetings.

2. Referring to paragraph 10 of the affidavit of Cash Cole, the statement therein contained that

there was ever adopted at a duly and regularly called meeting of the Board of Directors of this corporation of which affiant had notice or at which he was present a resolution to the effect that Bayview Realty, Inc., would assume the management of Fairview Development, Inc., and received 5% of the total income of Fairview Development, Inc., with a minimum guarantee of not less than \$2,000 per month plus all expenses incurred by Bayview Realty, Inc., is utterly false. That no such action was ever taken by any regularly constituted meeting of the Board of Directors of said corporation nor was any such action ever taken at any meeting at which affiant was present or of which he had notice. Affiant further denies that the Board of Directors of said corporation, Fairview Development, Inc., ever authorized an agreement upon such basis or ever authorized any written agreement between Bayview Realty, Inc., and Fairview Development, Inc., purporting to embody the terms referred to as to said agreement of December 1, 1951. That at no time has Cliff Mortensen and Nelse Mortensen or Frank V. Henderson, or either of them, either in their capacity as stockholders or in their representation on the Board of Directors ever agreed to the payment of any such management sum to Bayview Realty, Inc., and/or Cash Cole or Everett Nowell.

3. Referring to paragraph 11 of the said affidavit of Cash Cole, affiant denies that the said Cash Cole and Everett Nowell, or either of them, have used their best efforts and energy in managing the

housing development known as Fairview Development, Inc.; that, on the contrary, they have arbitrarily preempted unto themselves the assets and income from said project, spent same at will without accounting to affiant and Nelse Mortensen and Frank V. Henderson therefor, and have wasted and mismanaged said project to its detriment and to the detriment of the stockholders of said corporation.

4. That there has never been any official action of the Board of Directors of said corporation authorizing the discharge of Herbert Lofquist, a certified public accountant, at one time employed to keep the books and records of said corporation. That affiant has received no accountings of the financial affairs of the corporation since Lofquist was purportedly discharged by Cole and Nowell who assumed unto themselves the authority to discharge him without the authorization of the Board of Directors of the corporation.

5. That the Board of Directors of said corporation has never, at any meeting attended by affiant or at any meeting of which he had notice, authorized the payment of any salaries to Everett Nowell as President of Fairview Development, Inc., or to Cash Cole as Secretary-Treasurer of said corporation.

6. That from the time of the organization of the Fairview Manor project, Everett Nowell has been employed by Alaska Freight Lines in a managerial or semi-executive capacity and has devoted a large

portion of his time to the interests of Alaska Freight Lines. That the said Everett Nowell has maintained a residence in the City of Seattle, Washington, and spends a large portion of his time in the City of Seattle, particularly during the winter months, and on matters wholly unrelated to the affairs of Fairview Development, Inc.

That Cash Cole has on several occasions since the inception of the project spent several months at a time sojourning in California on matters unrelated to the affairs of the corporation.

That Cliff Mortensen has never received nor drawn any salary from Fairview Development, Inc., although his efforts in the furtherance of its affairs and welfare have consumed large amounts of his time and managerial abilities, particularly in connection with matters pertaining to the financing and matters pertaining to the construction of said project. That it was the credit and financial standing of affiant, Cliff Mortensen, Nelse Mortensen and Frank V. Henderson, which made this project an actuality in the first place and that without said credit and financial standing and assistance and construction ability, Cole and Nowell would themselves have been unable to erect said project.

7. Referring to paragraph 15 of the affidavit of Cash Cole, the statement that it is necessary that Cash Cole and Everett Nowell occupy apartments in said housing project is false; that said apartments were occupied simply as matters of personal convenience to Cole and Nowell and were occupied

by them free, over the protest of affiant, Nelse Mortensen and Frank V. Henderson, and that such occupancy has never been authorized by any duly constituted or held Directors' meeting of the corporation. That the statement that proper minutes of the meetings of the directors of said corporation have been kept by Cole and Nowell is not true; that such minutes as Cole and Nowell purporting to substantiate their position are simply self-serving minutes of meetings which either never did take place or were held by Cole and Nowell without notice to affiant and/or Nelse Mortensen and Frank V. Henderson.

8. Referring to paragraph 16 of the affidavit of Cash Cole, Fairview Development, Inc., had commenced occupying and renting the units in the project prior to August 1, 1951; that the construction required to be done by Nelse Mortensen, Cliff Mortensen and Frank V. Henderson under the terms of the construction contract had been done prior to the date referred to in said paragraph and that consequently the obligations to pay the mortgage interest due January 1, 1952, and February 1, 1952, and the taxes levied August 1, 1951, were the obligations of Fairview Development, Inc., and not the obligations of Nelse Mortensen, Cliff Mortensen and Frank V. Henderson and/or Nelse Mortensen Alaska, Inc., or any of them.

9. Referring to paragraph 17 of Cash Cole's affidavit, affiant admits that there has recently been filed in the United States District Court for Western District of Washington a suit purportedly

brought in the name of Fairview Development, Inc., against affiant Cliff Mortensen, Nelse Mortensen and Frank V. Henderson wherein the prayer is for damages in the sum of \$699,912.27; affiant states, however, that said action has not been authorized by the Board of Directors of said corporation; that said action is without basis in law or in fact and is simply another unauthorized act on the part of Cole and Nowell to injure the credit and reputation of affiant, Nelse Mortensen, and Frank V. Henderson.

10. That in answer to paragraph 19 of the affidavit of Cash Cole, affiant states that he has read the affidavit of J. E. Swanson, Jr., herein in answer to the affidavit of Cash Cole and Everett Nowell. That the matters stated in the affidavit of the said J. E. Swanson, Jr., and in the transcription prepared by him as to what took place at the meeting of October 29, 1952, are true and correct and represent a full, true and correct and accurate account of what occurred at said meeting October 29, 1952.

That when the project was completed and the units occupied, Cash Cole and Everett Nowell, on behalf of themselves and on behalf of Bayview Realty, Inc., agreed to provide a fidelity bond to indemnify the corporation in connection with the handling of the corporation's funds. That such a bond was issued, but that the said Cole and Nowell have consistently refused either on behalf of themselves or on behalf of Bayview Realty, Inc., to sign the application for said bond, with the result that the bonding company cancelled the same and that

they have failed to furnish good and proper bond to the corporation.

11. Referring to paragraph 5 of the affidavit of Everett Nowell, filed herein, the lien claims therein referred to are all involved presently in litigation. That affiant, Nelse Mortensen, and Frank V. Henderson have presently on deposit in escrow with the National Bank of Commerce of Seattle funds in the amount of \$478,000 to cover such of said lien claims as may be adjudicated to be valid claims. That Cash Cole has done nothing whatsoever to protect the interests of Fairview Development, Inc., in connection with said lien claims, but, on the contrary, has, if not actively, at least, passively, co-operated with A. G. Rushlight & Co. in an effort to help said A. G. Rushlight & Co. substantiate its claim simply for the purpose of injuring affiant, Nelse Mortensen, and Frank V. Henderson and that instead of taking an adversary position to the positions of said lien claimants, Cash Cole has on the contrary taken a friendly position toward the said lien claimants and has been working and is working contrary to the interests of Fairview Development, Inc., in connection therewith.

/s/ CLIFF MORTENSEN.

Subscribed and Sworn to before me this 10th day of August, 1953.

[Seal] /s/ HERMAN HOWE,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed August 14, 1953.

[Title of District Court and Cause.]

ANSWERING AFFIDAVIT OF CLIFF MORTENSEN IN OPPOSITION TO AFFIDAVITS OF CASH COLE AND EVERETT NOWELL

State of Washington,
County of King—ss.

Cliff Mortensen, being first duly sworn on oath, deposes and says: That he is one of the plaintiffs above named and makes this affidavit in opposition to the affidavits of Cash Cole and Everett Nowell on file herein.

That attached hereto is a photostatic copy of a letter received by affiant, dated May 24, 1951, from Everett Nowell pertaining to Fairview Development, Inc., and the operation of the Fairview Manor project. That said letter is on the letterhead of Alaska Freight Lines and is signed "Ev" and was received by affiant in due course of business pertaining to the affairs of Fairview Development, Inc.

/s/ CLIFF MORTENSEN.

Subscribed and Sworn to before me this 11th day of August, 1953.

[Seal] /s/ J. E. SWANSON, JR.,
Notary Public in and for the State of Washington,
Residing at Seattle.

Inter-Office Communications
Alaska Freight Lines, Inc.

Date: May 24, 1951.

To:

Subject:

From:

Dear Cliff:

Am leaving here June 7th for Juneau and after spending a couple of days there will come on in to Seattle. I feel it is necessary that we call a meeting of Fairview Development and discuss the management of the project. As it is with Cash controlling Bayview, he will run the place to suit himself and has control of all the funds and can pay himself an exorbitant salary and expenses and the rest of us will be on the outside.

Hope Ken will be able to come on down with me. You have probably gone over these matters with Joe but we have to have a specific contract with Bayview and have all the money deposited in Fairview and controlled by the accountants. We should also bond Cash. I don't trust the Bastard after what he pulled on Ken.

Met with Call and Hoopes today. They are preparing a letter to us, with copies to FHA and Health Dept. that the city plans on installing water mains at Weeks Field and when they are in will be able to furnish water to our project. This letter will satisfy the health dept. to approve our present sys-

tem, if you can call it that. We are pumping up more sand than water at present and Stan is plenty worried.

The City has gone on record that they have to furnish us sewage disposal when we are ready to occupy the first building, so about the only thing that will hold us up for July first is the painters, floor men or that our appliances do not arrive.

We have about 200 letters requesting apts. and we haven't assured anyone of anything. God knows what would happen if we advertised the rentals. People are still hounding us for a date so they can get their furniture, etc. I'm doing nothing about nothing.

By all means we should have Frank Henderson at our meeting as he will be the only one that will be able to half reason with an insane man.

Best to all,

/s/ EV.

[Endorsed]: Filed August 14, 1953.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF PLAINTIFFS'
MOTIONS FOR APPOINTMENT OF RE-
CEIVER AND TEMPORARY INJUNC-
TION

United States of America,
Territory of Alaska—ss.

The undersigned, Frank V. Henderson, being first duly sworn upon oath, deposes and says as follows:

1. That he is a citizen of the United States and the State of Washington; that he is over the age of twenty-one years and *sui juris*.

2. That he is one of the plaintiffs in the above-entitled cause, and that said cause was filed by Fairview Development, Inc., an Alaska corporation; Nelse Mortensen, the undersigned and Cliff Mortensen, individually and as directors and stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., because of the deadlock in the conduct or management of the affairs of the plaintiff corporation, Fairview Development, Inc., due to failure of the board of directors to proceed; deadlock among the stockholders and members of the board of directors resulting in deadlock and paralysis of corporate functions; dissention and discord as to who in fact compromise the board of directors; mismanagement and improper disposition of funds and dissipation of assets, and impairment of

said corporation property by one or more of the principal defendants in the above-entitled cause.

3. That the undersigned has read the affidavit executed by Cliff Mortensen and filed in the above-entitled cause on June 25, 1953, in support of plaintiffs' motions for appointment of receiver and temporary injunction, and is familiar with the facts therein stated; and that by reference to said affidavit the undersigned does hereby adopt all of the statements therein made as if fully set out herein and confirms the same.

4. That the undersigned is informed and believes and upon such information and belief states the facts to be that the defendants in the above-entitled cause, or one or more of them, has used or will use monies or other funds of the plaintiff, Fairview Development, Inc., for the purpose of various unauthorized additions or changes in the structure and appurtenances of the Fairview Manor without proper authorization from the stockholders or the board of directors of said corporation, and to the irreparable harm and loss of the stockholders; and that such funds and monies of said plaintiff corporation are used for payment of unauthorized and excessive salaries to the defendants, Cash Cole and Everett Nowell, for other persons best known to said defendants, without proper authority either from said stockholders or board of directors to the irreparable loss and damage of the stockholders.

5. That the undersigned is further informed and believes and upon such information and belief states

the facts to be that the affairs of said plaintiff corporation, Fairview Development, Inc., have not been properly conducted or managed due to the failure and refusal of the defendants herein individually and in their respective capacities, to hold stockholders' meetings and board of directors' meetings, to abide by the bylaws of said plaintiff corporation, its articles of incorporation and the General Laws of the Territory of Alaska concerning the control and conduct of corporate affairs, and have prevented and continued to prevent each of the plaintiffs, who are stockholders or Cliff Mortensen as director and officer of said plaintiff corporation, from exercising their legal rights, title and interest in said corporation and in the conduct and management of the affairs of said corporation, to their irreparable injury, loss and damage, as well as to the irreparable injury and damage of said plaintiff corporation.

6. Efforts to settle the differences existing between the individual plaintiff stockholders and the individual defendant stockholders of the Fairview Development, Inc., have been made for some time, but no accord or compromise has been reached, and the discord and lack of agreement between said stockholders has continued and continues to the date hereof and has resulted and continues to result both in a deadlock among the stockholders of said plaintiff corporation and its directors. Said deadlock can only be resolved by a final decree of this Court in the above-entitled action. In the meanwhile the interests of the plaintiff stockholders and the plaintiff corporation can only be protected by the

appointment of a disinterested person as a receiver, and such appointment is necessary at this time to prevent further dissipation of assets of the plaintiff corporation and to grant to the plaintiff stockholders equal protection with that of the defendant stockholders.

7. The undersigned has been informed by the Territorial Health Department, Juneau, Alaska, and believes, and upon such information and belief states the facts to be that the defendant, Cash Cole, has violated health regulations pertaining to the Fairview Manor involved in this cause in the following respects:

(a) Said Cash Cole has refused to chlorinate the water used in said Fairview Manor as required by said health regulations.

(b) The Health Department has previously refused to allow drilling of a well near or adjacent to the building constituting said Fairview Manor, and has required previous approval of well sites. Said defendant Cash Cole has begun drilling a fourth well during the past year adjoining one of the buildings, a distance of approximately 6 to 8 feet contrary to the requirements of the Territorial Health Department, and without submitting for approval the site selected for said fourth well, and without authority from the board of directors or the stockholders. The undersigned advised Mr. Cole at the time said drilling was commenced regarding the disapproval of any location near the building for such well and their requirements, but said defend-

ant stated: "The hell with the Health Department! What can they do about it?" The undersigned advised Mr. Cole that such well could be condemned, but the latter stated they could not do so after it was drilled. The undersigned was informed at the Territorial Health Department several days ago that no request for approval of the drilling of said well had been received by said department.

Such violation of the regulations of the Health Department not only jeopardizes the health of the tenants at said project, but also the community, and results in unauthorized and unnecessary expenditure of corporate funds of the plaintiff corporation.

8. The undersigned has also been informed and believes and, upon such information and belief, states the facts to be that a four-inch line is contemplated or has been connected to the Fairview Manor water supply from the Hebb and Nordick's project, known as Arctic Park, located across the Airport Road from the Fairview Manor. Such connection has not been authorized by the stockholders of the plaintiff corporation or its board of directors, and is to the disadvantage and detriment of said stockholders and said plaintiff corporation.

9. The discord and disagreement and conflicting claims of the stockholders of the plaintiff corporation are further evidenced by the litigation now pending and involving said stockholders. Said litigation is as follows:

(a) Certain disagreements existed as to the work done on the Fairview Manor project by two sub-

contractors of Nelse Mortensen-Alaska, Inc., the general contractor. These subcontractors were: A. G. Rushlight & Company, an Oregon corporation, and Pilip & Butt, Inc., a corporation. Said subcontractors filed mechanics liens on their disputed claims against the Fairview Manor project. To resolve these disputes separate suits were filed by said general contractor and its successors in title against said subcontractors as follows: (1) Nelse Mortensen-Alaska, Inc., a corporation, et al., vs. A. G. Rushlight & Company, a corporation, in the District Court of the United States for the Western District of Washington, Northern Division, Case No. 3105; and (2) Nelse Mortensen, Cliff Mortensen and Frank B. Henderson, as co-partners, doing business as Nelse Mortensen-Alaska Co., et al., vs. Pilip & Butt, Inc., a corporation, and Clem Pilip, doing business as Clem Pilip Co., et al., in the Superior Court of the State of Washington for King County, as Case No. 442980. Suit was filed to foreclose its lien in this Court in which the above-entitled proceedings are pending by A. G. Rushlight & Company as Case No. 7163 against the Fairview Development, Inc., plaintiff in this cause, and Nelse Mortensen-Alaska, Inc., and others. The undersigned has been informed and believes and, upon such information and belief, states the facts to be that said Cash Cole has aided and abetted in the filing and prosecution of said suit, and has failed to assist in the defense thereof on behalf of Fairview Development, Inc., all to the detriment of said Fairview Development, Inc., and its stockholders.

(b) Suit was filed on or about July 23, 1953, under instructions of said Cash Cole in the District of the United States for the Western District of Washington, Northern Division, as Case No. 3532, entitled: Fairview Development, Inc., a corporation, vs. Nelse Mortensen-Alaska, Inc., the individual plaintiffs in this suit and their respective wives, on various purported claims arising under the construction contract between said Nelse Mortensen-Alaska, Inc., and the plaintiff corporation. Said suit was filed without proper authority of the stockholders of said corporation or its board of directors, and for the purpose of harassing the individual plaintiffs in this suit, and apparently in an effort to compel said individual plaintiffs to cease prosecution of this suit. This new litigation is referred to in paragraph 17 of Mr. Cole's affidavit filed in this cause.

(c) The above-entitled suit in which this affidavit is filed, the new suit mentioned in the preceding subparagraph, and the conduct of Mr. Cole in the Rushlight case show a serious deadlock among the stockholders of the plaintiff corporation, and disagreement as to conduct and management of the business of the plaintiff corporation and the impossibility of either the plaintiff stockholders or the defendant stockholders from imposing their will upon each other because of the equal division of the common stock, and therefore the necessity for appointment of a receiver to preserve and administer the corporation's property for the equal benefit of

all of the stockholders of the plaintiff corporation until the trial is held in this case and this Court, by final decree, directs disposition of the plaintiff corporation's assets.

10. Contrary to the statements contained in Mr. Cole's affidavit, Par. 17, filed in this cause the individual plaintiffs have completed the construction of Fairview Manor project according to the terms and provisions of the construction contract and have complied with all of its requirements, except for a few minor items, which said individual plaintiffs have attempted to settle with Fairview Development, Inc., but have been unable to do so by reason of Mr. Cole's opposition and refusal to consider any negotiations but only his own exaggerated and groundless claims alleged in the case above mentioned bearing No. 3532 referred to in paragraph 9(b) herein. The items in dispute do not exceed the maximum sum of \$20,000.00, whereas claims in the sum of \$699,912.27 have been made in the said suit. Many of these excessive and unreasonable claims are based on defects resulting from defective plans and specifications prepared by an architect selected by Mr. Cole in accordance with the agreement between the plaintiff corporation and the general contractor, and from changes occurring during the progress of the construction, which changes were required and authorized by the stockholders of the plaintiff corporation.

11. The defendant, Bayview Realty, Inc., was required as property management agent for the

plaintiff corporation to secure and deliver a bond in the sum of \$10,000.00. The latter failed to complete the usual application required by the United Pacific Insurance Company, which issued such bond for a term of three years from October 3, 1951. Efforts to secure such application from said Bayview Realty, Inc., were without avail. The cost of the premium on said bond was finally billed on December 20, 1951, to Fairview Development, Inc., plaintiff in this case. Said defendant Bayview Realty, Inc., and its officers, said defendants Cole and Nowell, refused to sign said application or to furnish a financial statement. In view of such failure and lack of co-operation said United Pacific Insurance Company under its right of cancellation cancelled said bond on April 25, 1953, and returned the unearned premium under said bond.

12. Contrary to the statements contained in Mr. Cole's affidavit, paragraph 11 thereof, filed in this cause, said individual defendants, Messrs. Cole and Nowell, were not required to manage said Fairview Manor, since by agreement said management was to be in Bayview Realty, Inc.; they have not used their best efforts and energy in managing said project; and there was no danger of said project becoming insolvent, or being unfit for occupancy or falling into the control of the mortgage holder, under other management. Mr. Cole has spent extended periods between November, 1951, and the date hereof in Seattle, Washington; Washington, D. C.; California, and other places away from the Fairview

Manor project. Mr. Nowell has only made token visits to the Fairview Manor project during that same period and has only spent limited time in its management. The undersigned is informed and believes and, upon such information and belief, states the facts to be that Mr. Nowell has had full time employment on a position located some distance from the City of Fairbanks.

13. Contrary to the statements contained in paragraph 14 of said affidavit of Mr. Cole, no salaries were authorized to Mr. Cole or Mr. Nowell by the stockholders or by the board of directors, and were not justified or authorized merely by reason of the fact that they were acting as officers of said corporation.

14. The occupancy of apartments referred to in paragraph 15 of Mr. Cole's affidavit by the defendants, Messrs. Cole and Nowell, were not authorized by the board of directors or by the stockholders of the plaintiff corporation. As previously stated Mr. Nowell made only token visits to said project and had a full time occupation located some distance from the City of Fairbanks.

15. The undersigned has not received notice of stockholders' meetings or corporate reports or accounts' reports referred to in Mr. Cole's affidavit.

16. That contrary to the statements made in the affidavit filed in the above-entitled cause by Everett Nowell, defendant, concerning failure of the individual plaintiffs herein as the successors to the

general contractor to discharge their responsibilities by permitting the liens hereinafter mentioned to be filed, the undersigned declares that all such responsibilities have been performed and discharged as hereinbefore stated, and that said liens resulted from disagreements between the general contractor and the subcontractors, and claims of the general contractor against said subcontractors. The said affidavit of Everett Nowell refers to the following liens:

“a. Lien claim of A. G. Rushlight & Co., a corporation, in the sum of Three hundred fifty-six thousand four hundred three & 85/100 (\$356,403.85) Dollars plus interest and costs, filed December 19, 1951.

“b. Lien claim of Clem Pilip, d/b/a Pilip Company, in the sum of Seventy-seven thousand six hundred and eighty-one & 62/100 (\$77,681.62) Dollars plus interest and costs, filed January 21, 1952.

“c. Lien claim of C. H. Keaton, d/b/a Keaton Paint Company, in the sum of Seventeen thousand three hundred thirty-nine and 44/100 (\$17,339.44) Dollars plus interest and costs, filed February 16, 1952.

“d Lien claim of Pilip & Butt Painting Contractors, Inc., in the sum of Seventy-seven thousand six hundred eighty-one & 62/100 (\$77,681.62) Dollars plus interest and costs, filed March 3, 1952.”

The lien mentioned under subparagraph (a) above is involved in the two suits heretofore men-

tioned in paragraph 9(a). The lien mentioned under subparagraph (b) above was filed by error and disclaimed by Clem Pilip in writing in the Rushlight case pending before this Court. The lien mentioned in subparagraph (c) is that of a subcontractor of Pilip & Butt Painting Contractors, Inc. Both the liens mentioned in subparagraph (c) and (d) above are involved in the Rushlight case pending before this Court and in the case above mentioned in paragraph 9 (a)(2).

Said liens have not been allowed as stated in said Everett Nowell's affidavit and have not placed the ownership of said project in jeopardy, since the individual plaintiffs have fully protected the plaintiff corporation against said liens by cash deposit of funds pending determination of the litigation involving said liens, and said liens have not endangered the good relationship with loaning institutions or the success of the entire corporation since no new loans are required and since the plaintiff corporation is fully protected against said liens.

6. That a disinterested person should be appointed by this Court to conduct and control the affairs of said corporation and preserve and maintain its assets and funds for the equal protection of all parties to this cause of action and until entry of the final decree of this Court; and that pursuant to the prayer contained in the complaint filed in the above-entitled cause, and under the general laws of the Territory of Alaska, the plaintiffs, jointly and severally are entitled to the appointment of a re-

ceiver for the property of said corporation, Fairview Development, Inc., to collect the rents, issues, income and profit thereof during the pendency of this action and until final decree of this Court, and to protect and preserve said property and the interests of said corporation and the interests of all of the stockholders of said corporation; and to the entry of a temporary injunction restraining and enjoining said defendants, Cash Cole and Everett Nowell and Bayview Realty, Inc., as prayed for in the complaint filed herein.

Dated at Anchorage, Alaska, this 12th day of August, 1953.

/s/ FRANK V. HENDERSON.

Subscribed and sworn to before me this 12th day of August, 1953.

[Seal] /s/ RALPH P. WOODY,
Notary Public in and for the
Territory of Alaska.

My commission expires: 5/4/55.

[Endorsed]: Filed August 14, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF J. F. CAMPBELL

State of Washington,
County of King—ss.

J. F. Campbell, being first duly sworn, on oath deposes and says: I am a Vice President of Seattle

Trust and Savings Bank and the author and signator of that certain letter dated June 30, 1953, addressed to Fairview Development, Inc., Fairview Manor, Building #2 Office, Fairbanks, Alaska.

This affidavit is made for the purpose of setting forth the facts on which the statements made in the following paragraph of that letter were predicated, to wit:

“First, I want to compliment you on the work that has been done to keep the property operating in an efficient manner. Upon receipt of the figures indicating the amounts of money that have been spent, they appeared staggering at first glance but after my examination of the premises and familiarizing myself with the problems which you have had to face, one can not help but admire the management’s approach to its problems and its will and determination to correct the deficiencies that have developed, for the preservation and continued operation of the project.”

On, to wit, June 6 and 7, 1953, affiant, at the request of the mortgagee, Institutional Securities Corporation, which holds the mortgage on the Fairview Manor in Fairbanks, Alaska, inspected the mortgaged property for the purpose of determining whether or not the mortgaged property was in actual operation, whether or not it was being maintained and protected, and to ascertain whether or not waste was being committed on the premises, and thereafter affiant reported in writing on his findings and

observations to Mr. Paul C. Henderson, Assistant Secretary, Institutional Securities Corporation, 60 East 42nd Street, New York 17, New York, the mortgagee, by letter of June 11, 1953, a copy of which is attached to this affidavit, denoted as Exhibit "A" and by this reference made a part hereof as fully as if set forth at length herein.

In commenting on improvements and management in the letter of June 30, 1953, affiant intended only to indicate that from the standpoint of the mortgagee any improvements which enhanced the value of the mortgage security were acceptable without giving consideration to the reasonableness of the costs or the necessity therefor.

/s/ J. F. CAMPBELL.

Subscribed and Sworn to before me this 11th day of August, 1953.

[Seal] /s/ HARRIET WATCHIE,
Notary Public in and for the State of Washington,
Residing at Seattle.

(Copy)

EXHIBIT "A"

Seattle Trust and Savings Bank
Second Avenue at Columbia Street
Seattle 4, Washington

11 June, 1953.

Mr. Paul C. Henderson, Assistant Secretary,
Institutional Securities Corporation,
60 East 42nd Street,
New York 17, N. Y.

Re: ISC Trust No. T241-1,
Fairview Manor,
Fairbanks, Alaska,
FHA Project #130-42013.

Dear Mr. Henderson:

Annual Inspection—June 6 & 7, 1953

En route to Fairbanks for this inspection, I stopped at Juneau, for a discussion of responsibilities for current conditions at the project and of problems to be encountered in gaining information. I held a conference with Messrs. Carroll, Smith and Magnuson, Regional Director, Chief Underwriter, and Chief Appraiser, respectively, of the FHA in Alaska.

From FHA's viewpoint, the construction was completed satisfactorily and in accordance with specifications. Sufficient personnel has not been available, in the territory, to supervise with extreme care

Exhibit A—(Continued)

and attention the multitude of construction being completed; however, reasonable care and attention to details has been given to assure that substitutions when necessary have complied with territorial building standards and requirements. FHA officials in Alaska, however, concur with the management's actions for some of the improvements and betterments made since construction was completed, and they acknowledge that current information on some of the expense items would now direct higher estimates in its project analysis.

It may be proposed and proved that errors in design and mechanical engineering have contributed greatly to the problems encountered in this first year's operation. It may be shown, also, that construction and mechanical installation errors or inadequacies have contributed largely to operational difficulties during the period under review. Regardless of the causes, however, it is certain that a large amount of income has been used to purchase additional equipment for operation of the apartment, and no small amount has been expended to make seemingly necessary repairs or changes.

A very large part of Fairview's troubles, regardless, rests in the management's attitude and approach to its problems. I shall not go into detail of the background or personalities involved, as such is controversial and one upon which I do not feel qualified to pass judgment. You are aware that Fairview Development, Inc., was organized by Mr.

Exhibit A—(Continued)

Cash Cole of Fairbanks, Alaska—Mr. Everett Nowell of Alaska and Seattle—and Mortensen Construction Co., of Seattle. I am advised that Mortensen controls 50% of the common stock, and that Cole and Nowell hold the remainder. Stock records were not available for inspection, but there is no common stock outstanding according to the financial statement of December 31, 1952. Mr. Cole, however, is in active control and is responsible for the management of the project. He still appears of record as the corporation's secretary.

Mortensen incorporated a separate company for Alaska operations and entered into an agreement with Fairview for the construction of the apartment property. Claims and counter-claims have been and still are being made about every phase of the development. Troubles began at the outset and have continued. There are at least three separate legal actions pending, viz: Fairview vs. National Bank of Commerce, Seattle, to return to Fairview funds paid to Mortensen; Mortensen vs. Cole and Nowell, to turn over to him the management of Fairview Manor; and Rushlite, the plumbing contractor, vs. Mortensen for funds due on the construction. These matters will, we hope, be settled in court in the near future but it is difficult to forecast the probable result or at what future date peace and harmony might prevail.

In the meantime, Fairview Manor has suffered and will continue to do so until management de-

Exhibit A—(Continued)

termines to apply itself to the economic problems that must be faced, or until some other compelling force is brought into the controversy to preserve existing equities and the security of your investment.

I have advised the FHA officials in Juneau, and Mr. Cash Cole, Secretary of the corporation, in no uncertain terms that your position will be one of demanding timely performance under your note and mortgage, and have presumed to inform them that in my opinion it will be much to your benefit to cash out by assignment to the FHA at the first opportunity.

My role has been explained to them as one of a reporter passing on to you the information as I saw it. All of the information I have which is contained in this report is undenied by the management. They have seen my complete working papers, and I have told them quite bluntly my thought of the situation, bearing in mind always that we have had no part in any way in the problems which the management itself can not resolve so far as their differences are concerned.

Before going north, I compared the operating analysis which you prepared, with the project analysis, reducing it to a per room per annum cost, and was successful in obtaining comparable figures on another project in Fairbanks for comparison. I must say that the comparing unit is not as large, neither is it in as good physical condition as Fair-

Exhibit A—(Continued)

view Manor; however, I quote the following comparisons for whatever value they may be to you in analyzing my findings:

Re: Fairview Manor

Per Room—Per Annum, 1952

	Project Analysis	Fairview Manor	Fairview Comparable
Renting Expense	\$ 1.00	\$.04	\$ 2.10
Administrative Expense	31.26	72.19	26.89
Operating Expense	76.56	158.04	102.13
Maintenance Expense	61.40	58.34	50.60
 Total Operating Expense	<u>\$ 170.22</u>	<u>\$ 288.61</u>	<u>\$ 181.72</u>
 Real Estate Taxes	<u>\$ 72.40</u>	<u>\$ 53.71</u>	<u>\$ 21.25</u>
Reserve for Replacements	<u>\$ 25.28</u>	<u>\$ 25.28</u>	<u>\$ 19.65</u>

Below is a detail of my examinations of the records and operation of this project:

Administrative Expenses

Management: \$23,000.00.

Mr. Cash Cole, the active manager, drew a salary of \$1,000.00 per month for the entire year of 1952. Mr. Nowell was paid the same salary for eleven months of the year, but has not drawn that amount since November, 1952.

Superintendent and Manager's Salary: \$2,700.00.

During the early part of the year, it was necessary for Mr. Cole to be absent from Fairbanks so Mr. Nowell secured the services of a manager on a tem-

Exhibit A—(Continued)

porary basis, who was paid the amount of \$2,700.00 which is listed as manager's salary.

Clerical: \$7,481.49.

A bookkeeper is hired at the rate of \$400.00 per month, plus her apartment at \$150.00 per month; and Mrs. Cash Cole receives a payment of \$200.00 per month for showing apartments. The remaining items contained in that amount are all relatively unimportant.

Telephone & Telegraph Expenses: \$2,422.44.

This is high because of the habit of the management when they are away from the project to use long distance at regular intervals.

Legal and Auditing Expenses: \$12,784.41.

The firm of Pritchard & Lofquist of Seattle, was employed on January 1, 1952, and continued through the year of 1952, at \$500.00 per month. That service was discontinued on January 1, 1953. One firm of attorneys was employed to bring suit against the National Bank of Commerce and were paid a preliminary retainer fee of \$2,500.00. Another attorney has now been employed to pursue the same action and he was paid during 1952 a preliminary retainer fee of \$1,000.00. Both of these were Seattle attorneys. A local attorney in Fairbanks has been paid for normal legal work in collecting rents, etc., and for preparing certain instruments; however, that is relatively small in proportion, as the three items

Exhibit A—(Continued)

above make up the majority of this total expenditure.

Office Expense and Manager's Expense: \$5,023.77.

This represents stationery, printing, supplies, and other items normally charged to this account; and the Manager's expense is primarily for travelling on the part of the managers and other personal expenses chargeable.

Miscellaneous: \$4,021.22.

This is the catch-all for several things, most of which represents additional expenditures of the management for their personal uses.

Operating Expenses

Heating and Ventilating: \$32,128.99.

This represents charges for fuel and materials purchased for the actual heating plant. As you know, these are coal-burning furnaces, and the expense shown here is not out of line for that territory, if that were the entire heating expense under proper cost accounting.

Janitorial Expenses: \$2,079.04.

This represents the charges for janitor supplies only.

Lighting and Miscellaneous Power: \$15,890.32.

This represents charges in the main by the City of Fairbanks which furnishes power at the rate of

Exhibit A—(Continued)

eight cents per KWH, which compares very poorly to power here in the City of Seattle at less than two cents per KWH. This cost represents \$19.66 per room per annum as compared to \$8.00 per room per annum on the comparable property above referred to; however, it must be remembered that we have in Fairview Manor a cost for common hallways in the basement, and hall lights to be maintained throughout the several entrances to the individual sections of the project; in addition, it has been necessary to maintain floodlights as there are no city lighting facilities in this area.

I am advised that the meters used by the City of Fairbanks are 220 amp. meters yet the current is actually only 208. When the City works out its meter problems it is anticipated that the power charge will increase as much as 20%. This is a deplorable situation, but one which I believe management can do little about, and it is of course an item upon which the project analysis erred badly.

Water: \$1,833.96.

Inasmuch as the project furnishes its own water, and all expenses therefor are covered under Power, the amount spent here represents only salt purchased to use in the softening process. They are now attempting to soften the water by an electrical process and salt is not being added at the present time.

Power Plant Expense: \$190.38.

Represents oil purchased for the auxiliary plant.

Exhibit A—(Continued)

Garbage: \$50.00.

This is the amount paid to the City of Fairbanks, and their explanation of the small amount for garbage collection service is that it is handled by one of the maintenance men with their own equipment so that the majority of that expense is contained in the payroll. It is impossible without a detailed audit to arrive at any proper figure.

Payroll: \$71,680.32.

This amounts to \$88.71 per room per annum as compared to \$38.91 on the comparable. However, included in this figure are proper charges for additions and betterments made by management in order to keep the buildings in fair operating condition. Many of these repairs and changes will be discussed in a subsequent paragraph. They are essentially completed, and I am advised that the payroll as of June 15, 1953, will be as follows:

	Per Month
One Ass't. Manager—\$800 plus \$165 for apartment	\$ 965.00
Three Firemen, \$500 each plus \$150 for apartments	1,950.00
One Maintenance Man, \$500 plus \$150 for apartment	650.00
One Maintenance Man (Carpenter) at \$3.50 per hour	725.00
Four Hall Girls—each at \$60.00 per week	1,080.00
Total	<u>\$5,370.00</u>

or a per annum total of \$64,440.00.

Exhibit A—(Continued)

Approximately the same amount of labor was employed last year. We therefore can only deduct that the difference between that figure and the \$71,680.32 represents approximately the amount of labor expended on improvements, and should be non-reoccurring after June 15th of this year.

Miscellaneous Expense: \$2,607.48.

Contains various items which did not appear to be out of line with normal operation.

Gas, Oil and Grease: \$1,271.33.

Is for the automotive equipment composed of two pick-up trucks used by the manager and assistant manager for all transportation; a dump truck used for hauling garbage and ashes; and a Cletrac used for snow clearance.

Maintenance Expense

Decorating: \$5,795.95.

This is for materials used in decorating and for a few contracts let to decorate individual apartments which were badly in need of freshening up. The project analysis provided \$19,168.00 per annum for decorating, which would amount to \$23.72 per room per annum. Fairview Manor spent \$7.17 per room per annum, and the comparable spent only \$1.45; however, the comparable is not in good shape, and it is in this category primarily that I believe the comparable should be disregarded, as the total main-

Exhibit A—(Continued)

tenance expenses of only \$50.60 as against Fairview's \$58.34 is badly out of line.

Repairs: \$23,248.48.

Amounts to \$28.77 per room per annum while the comparable shows \$23.89, each figure being about three times the project analysis estimates. Please refer to Fairview's letter to you of March 18th, the first page of which lists improvements made to the extent of \$113,745.79. All of that amount of money was expended during 1952 except for the sum of \$2,437.51 on the power plant and one-half of the real estate taxes paid during construction. Of the total amount of \$113,745.79, \$54,643.62 was capitalized, leaving expenses of \$59,102.17 from which we deduct \$31,612.00 for the taxes, which leaves the sum of \$27,490.17 representing expense during the year. Naturally, some of this is classified differently but the repair item of \$23,248.48 is made up principally of the items listed in the above mentioned letter and further explained to you by Mr. Lofquist in his recent letter. Many of the items expensed might properly be capitalized; however, I assume that their accountant has felt that they were proper charges to expense from a tax standpoint and classifications as made may have some bearing on the pending litigations. The items listed in the above letter I examined, and to the best of my ability they seem to be proper expenditures under the conditions outlined, and I really think that management

Exhibit A—(Continued)

can be criticized only for having done so without full knowledge of where funds were coming from to provide for proper payment.

I believe all of the other items contained in the analysis of expenses are self-explanatory and reasonably in line, with the exception of the real estate taxes estimated by the FHA at \$58,500.00, but assessed and currently being paid at the rate of \$43,400.00, which is \$53.71 per room per annum, while the comparable property is paying only at the rate of \$21.25 per room per annum. I think management has the problem of appearing before the Board of Equalization in attempting to prove that its taxes are out of line as compared to this similar project, because the per room per annum tax should not vary such an amount as the buildings provide comparable living accommodations and produce comparable incomes.

Please refer to the financial statement of December 31, 1952, under Fixed Assets and find Building Equipment, fixed—\$47,208.14; and Building Equipment, portable—\$5,112.30. Income is diverted for the purchase of this equipment and the improvements as follows: Generators for an auxiliary power plant—Fire extinguishers—Coal conveyors—Ash removers—Meter Cabinets—Storm-window Racks—Power Plant Additions—Vents—Storm Doors—and a new Well. I examined all invoices, and they appear to be in order. The amounts expended are for materials only except for the installation of the generators.

Exhibit A—(Continued)

With their own labor they have prepared and installed the remaining items.

The second well, which has been a bone of contention, is now down 309 feet but is charged to Building Equipment, Fixed—only to the extent of \$2,767.60. The total paid during 1952 was \$4,959.01. That not charged above has been expensed. They do not have water yet, and there is a probable amount due the well driller at this time of \$3,920.00; and it is anticipated that the maximum amount required to produce water would be another \$2,200.00, plus house and connections of \$1,000.00, or a total cost of \$12,079.00. This is conditioned upon their being able to produce water with the present drilling equipment and provided also that a screen is not necessary when the well is completed. If they are unfortunate in these two latter matters, a \$2,000.00 additional cost is estimated.

Charged to Building Equipment—Portable, are meters for the washing machines of \$1,110.05; new small water pumps, \$3,460.04; a bar for Mr. Nowell's apartment, \$455.49; and laundry room carts of \$86.72.

One thing additional regarding Fixed Assets: Furniture and furnishings of \$4,124.25 and \$3,410.88—Funds have been expended for those items for the personal apartments of Mr. Cole and Mr. Nowell.

I have no particular comment to make on the

Exhibit A—(Continued)

other items contained on the balance sheet. Many of them that I have made no comment on are relatively unimportant; however, I do think that they reflect in some degree the management's philosophy. I might point out that the amount shown as Due Tenants is not advance rental but is a surety of one month's rent taken to protect the owners against needed repairs at time of vacancy; in any event, prudent management would retain those funds in a depositary and not use them in any way for operating expenses or capital outlays. As of the date of my inspection, there was about \$10,000 of cash on hand and in the bank, with all bills paid. It must be remembered that approximately \$30,000 of rental income was lost during the first three months of 1952, due to vacancies, and current bills were not paid because of lack of funds during that period.

If you will now please refer to the second page of Fairview's letter of March 18th, I want to comment briefly on the figure of \$64,375.00 of anticipated expenditures. I do not doubt that \$7,500 worth of additional insulation should be applied to prevent heat loss; however, I believe that the installation of vents on all sections of the buildings will eliminate the icing condition.

There is no question but that an error was made by someone in permitting this project to be completed without sufficient vents in the attic space when the insulation was applied in between the ceil-

Exhibit A—(Continued)

ing joists. On the top floor of this apartment you can count every nail used to secure the sheet-rock and although they are not protruding, they are visible because during the extreme cold the nails caused condensation in the apartments which in turn gathers dust and leaves the nail-heads clearly visible. The same condition exists on exterior walls.

Item #2 of the letter has already been commented on, and bear in mind I am no engineer, but I do know that the City of Fairbanks does not furnish water and that this unit must be self-sufficient. I am told that two or three times throughout the first year's operation, it became necessary to pull the pumps and examine the strainers as water was not available in sufficient quantity to maintain the apartments. I am also told that the water pipes were arranged to pump from two wells, and that they now are not of sufficient size in all of the locations to handle the required amount of water for the several units, from one central location. Water is a serious problem in that territory, and there is very little good water. Fairview water seems to be better than average, and it is hoped that they will, with their second well, secure sufficient water with their current undertaking.

Item #3—Surface Drainage and Repair Work. I am told this project was constructed upon a floating slab of reinforced concrete, no attempt being made in that situation to eliminate permafrost or to get beneath it. There is every evidence that these buildings

Exhibit A—(Continued)

and appurtenances are constantly subject to some slight shifting or what is known in that territory as "heaving." The freezing conditions seemingly shove certain parts of the building up and at a later date they drop down in small amounts, which causes difficulty in some of the interiors necessitating numerous changes on door clearances, etc., but it seems to be particularly damaging to the concrete walks and driveways. If you will refer to the plans, you will find that the garages are in the rear of these units and that concrete driveways and curbs were provided. In addition to some breakage of that concrete, they were not laid with proper drainage in mind, or the elevations have changed, due to the heaving. Each of the front sidewalks approaching the individual sections of each of the four buildings is at or below grade and there should be some corrections made; however, I do not think it will be necessary to expend as much as \$9,500.00, and thinking that this figure is only being thrown at you as a comparable figure to that which they are claiming against the contractors, I have suggested to them that they cover the entire site of the sidewalk area with sufficient asphalt to bring it to the level of the first step on each front stoop, giving that asphalt a slight crown for drainage purposes, and that approximately 250 sq. ft. of the concrete behind Bldg. #2 be removed so that drainage can be corrected to eliminate the melting snow, etc., from going directly into the basement and boiler room of Bldg. #2.

Exhibit A—(Continued)

Item #4 of this section of Fairview's letter calls for additional pipe insulation to prevent sweating, on which they anticipate expending \$6,500.00 and they have a bid for that amount. The water which comes from these wells is under 33 degrees temperature and exposed pipes naturally will at certain points of humidity sweat badly, and they have experienced some claims by tenants where materials in their lockers were badly damaged. They are now experimenting with a cork and rubber insulation which can be applied much like paint and it appears to be working. I would estimate that if this continues to be successful under year-round conditions, a cost of \$1,000 for material will make this correction.

Last but not least, of their anticipated expenses is the cost of replacing aluminum roof where damage was caused by ice removal, at an estimated price of \$25,875.00. This again represents a figure which they might claim against the contractor; however, I examined the roof and can find little damage. The ridgepole cover on a portion of Bldg. No. 2 has been badly dented and should be examined further to make sure that it is water tight, and that may need to be replaced. There are some hatchet or ax holes down near the overhang where the icing condition was the most extreme, but I have suggested to them, and I think that they can, with a reasonable amount of immediate attention, prepare aluminum patches which can be applied and

Exhibit A—(Continued)

will give this roof its normal permanent life. Many nails are extended, and a screw-type of nail has been recommended in replacing those, to assist in holding the roof down under extreme climactic conditions. In this area, were they subject to severe windstorms, I would think the nailing down of the roof would be an emergency matter at this time.

I have prepared the usual type of inspection reports, one on each of the four individual buildings. Each building, as you know, contains eight (8) sections, and the maintenance items that I have referred to are by sections within the individual buildings. These inspection reports are enclosed. Occupancy at this project is 100%—all apartments occupied or spoken for.

According to my understanding, the grounds were supposed to be landscaped and planted. There is no grass growing on this tract except in one or two isolated places, and the grading is improper. You may deem it advisable to insist that this ground be properly seeded in order to give the property a proper approach from a competitive standpoint. You must bear in mind, however, that this would call for the additional expense of maintaining the lawn.

In the heart of the business area, two 608 multiple story projects have been completed during the past two years. I inspected those also, and they appear to be in good condition, and are 100% occupied. I am advised that they suffered the same loss in income

Exhibit A—(Continued)

during the past winter that the subject property suffered. Rentals in the downtown area for comparable space are about \$25 to \$30 per apartment more than Fairview Manor.

Immediately across the street from Fairview Manor, 150 duplex units are being constructed this year, and it is anticipated that their rental schedule will be comparable to that of Fairview Manor.

Attempts are being made to arrange for another 608 directly across the street from Fairview Manor. The success or failure of these negotiations were not available to me.

Generally speaking, the City of Fairbanks, with a population of 30,000 appears to be thriving, as a tremendous amount of government work is being done there. Additional military housing is being planned, and the bases are continuing to be expanded.

I apologize for this lengthy letter, but I know of no other way in which to bring the problem to you, and there are still no doubt many questions that I have left unanswered. Obviously, we shall be happy to attempt to secure an answer for you on any particular matter that you feel is important.

I have told the management that their request for funds out of the Reserve for Replacement Account is being denied, and I have also told them that we feel it is essential that a definite program be worked

Exhibit A—(Continued)

out and communicated to us, for a steady and orderly decoration of the interior of the buildings and also that the exteriors not be permitted to suffer.

By comparison with other frame buildings in the Fairbanks area, this is a beautiful project; however, I do not think that it should be judged from a distance, and I feel that you should to some degree, insist upon the proper maintenance of your security. We await your instructions and stand ready to communicate them to Fairview Manor, and to report to you upon the progress they have made.

In accordance with our agreement, you are to reimburse us for my transportation cost to and from Alaska. The cost of the round-trip by air was \$186.30, as per the Northwest Airlines schedule attached, and we shall appreciate your check to us for that amount to cover.

Yours very truly,

/s/ J. F. CAMPBELL,

Vice President and Manager,
Mortgage Loan Department.

JFCampbell:

awe

Via air mail

cc: Mr. C. A. Carroll,
FHA Terr. Director, Juneau.

Exhibit A—(Continued)

(Copy)

Institutional Securities Corporation

Reinspection Report

Exterior and Interior

Number: T-241-1

Date: June 7, 1953

Property: Fairview Manor—Fairbanks, Alaska (#1)

(Sidewalks below grade)

G.—Good

F.—Fair

Rep.)—Necessary

Nec.)—Repairs

Exterior Condition

	G.	F.	Rep.	Nec.
Sidewalk		x		
Driveway		x		
Masonry	None			
Stucco	None			
Siding		x		
Windows		x		
Doors		x		
Exterior Painting			x	
Chimney				
Leaders and Gutters			None	
Roof			x	
Fire Escapes	None			
Garage		x		
Grounds				x

Exhibit A—(Continued)

Interior Condition

	G.	F.	Rep. Nec.
Halls	x		
Stairways	x		
Elevators			
Basement	x		
Heating	x		
Plumbing	x		
Hot Water Htr.	x		
Floors	x		
Doors and Trim	x		
Walls (inside)		x	x
Ceilings		x	x
Bathroom Floors	x		
Refrigeration	x		
Ranges	x		

Describe repairs necessary and state whether or not urgent:

Exterior paint—West End—Sec. "E."

Exterior paint—West End—Sec. "H."

Exterior paint—South Side—Sec. "H."

Interior Decorating Program must be established.

Occupancy: 100%.

Remarks: See transmittal letter of 6/11/53.

SEATTLE TRUST AND SAVINGS BANK,

By /s/ J. F. CAMPBELL,

Vice President and Manager
Mortgage Loan Department.

Exhibit A—(Continued)

Institutional Securities Corporation

Reinspection Report

Exterior and Interior

Number: T-241-1

Date: June 7, 1953

Property: Fairview Manor—Fairbanks, Alaska (#2)

(Sidewalks below grade)

G.—Good

F.—Fair

Rep.)—Repairs

Nec.)—Necessary

Exterior Condition

	G.	F.	Rep.	Nec.
Sidewalk		x		
Driveway		x	x	
Masonry	None			
Stucco	None			
Siding		x		
Windows		x		
Doors		x		
Exterior Painting		x	x	
Chimney	x			
Leaders and Gutters		None		
Roof		x	x	
Fire Escapes	None			
Garage		x		
Grounds			x	

Exhibit A—(Continued)

Interior Condition

	G.	F.	Rep. Nec.
Halls	x		
Stairways	x		
Elevators	None		
Basement	x		
Heating	x		
Plumbing	x		
Hot Water Htr.	x		
Floors	x		
Doors and Trim	x		
Walls (inside)		x	
Ceilings		x	
Bathroom Floors	x		
Refrigeration	x		
Ranges	x		

State necessary repairs and whether or not urgent:

Exterior paint on West side Sec. "H" and South side of Sec. "H."

Exterior paint on East side Sec. "H" also on South side of Sec. "G."

Exterior paint on South side of Secs. "D" and "E."

Exterior paint on South side of Sec. "B" and on West side of Sec. "A."

Exterior paint on South side of Sec. "A."

(Ridge cover must be straightened.) Water gets into boiler room from rear driveway. Grade of drive should be changed to carry water away from the building—Sec. "G."

Occupancy: 100%.

Remarks: See transmittal letter of 6/11/53.

SEATTLE TRUST AND SAVINGS BANK,

By /s/ J. F. CAMPBELL,

Vice President and Manager

Mortgage Loan Department.

Exhibit A—(Continued)

Institutional Securities Corporation

Reinspection Report

Exterior and Interior

Number: T-241-1

Date: June 7, 1953

Property: Fairview Manor—Fairbanks, Alaska (#3)

(Sidewalks—Entrances—below grade)

G.—Good

F.—Fair

Rep.)—Repairs

Nec.)—Necessary

Exterior Condition

	G.	F.	Rep.	Nec.
Sidewalk		x		
Driveway		x		
Masonry	None			
Stucco	None			
Siding		x		
Windows		x		
Doors		x	x	
Exterior Painting			x	
Chimney	x			
Leaders and Gutters		None		
Roof		x	x	
Fire Escapes	None			
Garage		x		
Grounds			x	

Exhibit A—(Continued)

Interior Condition

	G.	F.	Rep. Nec.
Halls	x		
Stairways	x		
Elevators			
Basement	x		
Heating (1)	x		
Plumbing	x		
Hot Water Htr.	x		
Floors	x		
Doors and Trim		x	
Walls (inside)		x	
Ceilings		x	
Bathroom Floors	x		
Refrigeration	x		
Ranges	x		

Describe repairs necessary and state whether or not urgent:

Exterior paint—West End of Sec. "H."

Exterior paint—South side of Sec. "H."

Exterior paint—East side of Sec. "H."

(1) Change-over on 3-way valve complete this week.

Occupancy: 100%.

Remarks: See transmittal letter of 6/11/53.

SEATTLE TRUST AND SAVINGS BANK,

By /s/ J. F. CAMPBELL,

Vice President and Manager
Mortgage Loan Department.

Exhibit A—(Continued)

Institutional Securities Corporation

Reinspection Report

Exterior and Interior

Number: T-241-1

Date: June 7, 1953

Property: Fairview Manor—Fairbanks, Alaska (#4)

(Sidewalks below grade)

G.—Good

F.—Fair

Rep.)—Repairs

Nec.)—Necessary

Exterior Condition

	G.	F.	Rep.	Nec.
Sidewalk		x		
Driveway		x		x
Masonry	None			
Stucco	None			
Siding		x		
Windows		x		
Doors		x		
Exterior Painting			x	
Chimney	x			
Leaders and Gutters		None		
Roof		x		x
Fire Escapes		None		
Garage	x			
Grounds			x	

Exhibit A—(Continued)

Interior Condition

	G.	F.	Rep. Nec.
Halls	x		
Stairways	x		
Elevators			
Basement	x		
Heating (1)	x		
Plumbing	x		
Hot Water Htr.	x		
Floors	x		
Doors and Trim		x	
Walls (inside)		x	
Ceilings		x	
Bathroom Floors	x		
Refrigeration	x		
Ranges	x		

Describe repairs necessary and state whether or not urgent:

Some driveways need replacing.

Exterior paint on South and West sides of Sec. "A."

Exterior paint on South and West sides of Sec. "B."

Exterior paint on South and West sides of Sec. "H."

(1) Complete change-over this week.

Occupancy: 100%.

Remarks: See transmittal letter of 6/11/53.

SEATTLE TRUST AND SAVINGS BANK,

By /s/ J. F. CAMPBELL,

Vice President and Manager
Mortgage Loan Department.

[Endorsed]: Filed August 14, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF J. E. SWANSON, JR.

State of Washington,
County of King—ss.

J. E. Swanson, Jr., being first duly sworn on oath, deposes and says: That he is a citizen of the United States and of the State of Washington, over the age of twenty-one years, not a party to the above action and competent to be a witness therein. That he makes this affidavit in opposition to the affidavit of Cash Cole herein dated August 3, 1953, and purporting to be subscribed and sworn to by Cash Cole on August 3, 1953, before John E. Hedrick, Notary Public in and for the State of Washington, residing at Seattle. That he has read the said affidavit of the said Cash Cole and has likewise read a certain affidavit of Everett Nowell, dated August 3, 1953, purporting to have been subscribed and sworn to by the said Everett Nowell before John E. Hedrick, Notary Public in and for the State of Washington, residing at Seattle, on August 3, 1953, and that affiant makes this affidavit in opposition to the affidavits of the said Cash Cole and the said Everett Nowell as aforesaid.

That specific reference is made to paragraph 19 of the affidavit of said Cash Cole. That affiant was present at the said meeting of October 29, 1952, in Fairbanks, Alaska, referred to in said paragraph 19 and was present as an observer. That affiant was present during the entire length of said meeting and paid particular attention to the proceedings and matters there occurring; that affiant had made notes

on said proceedings during the course thereof and immediately upon the conclusion of said meeting, transcribed a full, complete and accurate record and account of the proceedings there taking place. That said account as transcribed by affiant is denoted "Exhibit A," attached to this affidavit, and by this reference is made a part hereof as fully as if set forth at length herein.

That affiant has been associated with Nelse Mortensen, Cliff Mortensen and Frank V. Henderson since July 1, 1952, and devotes his full time to their business interests. That affiant is thoroughly familiar with the affairs of Fairview Development, Inc., and the conflicts that have existed between Everett Nowell and Cash Cole on the one hand and Cliff Mortensen, Frank V. Henderson and Nelse Mortensen on the other hand relating to the affairs and management of Fairview Development, Inc., and the project known as Fairview Manor at Fairbanks, Alaska. That from July 1, 1952, down to the present, affiant noticed a constant conflict and difference of opinion between the said Nowell-Cole interests on the one hand and the Mortensen interests on the other, resulting in an utter deadlock on the Board of Directors of Fairview Development, Inc., and an inability of said Board of Directors to take any action for the welfare of said corporation.

/s/ J. E. SWANSON, JR.

Subscribed and Sworn to before me this 10th day of August, 1953.

/s/ HERMAN HOWE,
Notary Public in and for the State of Washington,
Residing at Seattle.

EXHIBIT A

(Copy)

October 29, 1952.

Memorandum of the Events Which Transpired at a Special Meeting of the Board of Directors of Fairview Development, Inc., held October 29, 1952, at 2:00 p.m. in the Office of Fairview Manor in Fairbanks, Alaska.

Those present at the meeting were:

Everett Nowell, Director;
Cash Cole, Director;
Cliff Mortensen, Director;
Josef Diamond;
J. E. Swanson, Jr.

The meeting was called to order by Everett Nowell who stated that the purpose of the meeting was to discuss the utilities problem at Fairview Manor. Everett Nowell led the discussion relative to the power situation and recommended installation of a power plant at Fairview Manor to continuously provide full power requirements for Fairview Manor. Everett Nowell then presented a plan for the installation of certain specific power generating equipment. This presentation, a copy of which is attached to this memorandum, was recorded by Everett Nowell on a dictaphone. Immediately following Mr. Nowell's presentation, the transcription was played back to the group. At the conclusion of the play-back Mr. Cole pulled the dictaphone plug from the wall outlet in the office.

Exhibit A—(Continued)

Mr. Mortensen replaced the plug stating that it might be desirable to record further matters to be considered at the meeting. Mr. Cole angrily removed the plug and stated that he refused to remain at the meeting if the dictaphone were left on. Mr. Nowell's presentation was then extensively discussed by the Directors. Questions of finance were also discussed.

Cash Cole then led a discussion relative to the coal situation and recommended the installation of stand-by oil burners for use if coal should be unavailable during the coming winter months. This presentation was also extensively discussed by the Directors.

Cliff Mortensen stated that because of the large capital outlay that would be required to make the suggested installations he felt that the matter should be presented to the stockholders at a regular stockholders' meeting. Cash Cole then stated that he wanted the installations made immediately; that he didn't intend to be hindered by the stockholders among whom no agreement had ever been reached and that he did not intend to stand for any further robbing of Fairview Manor by the Mortensens. Josef Diamond remarked that he thought Cash Cole was the one who was milking the corporation. At this point, Cash Cole launched a stream of profanity and abusive language directed against Josef Diamond and Cliff Mortensen, removed his glasses and threatened to strike Mr. Diamond who was seated in the room. When Everett Nowell and Josef

Exhibit A—(Continued)

Diamond attempted to restrain Cash Cole and prevent him from starting a fight, Cash Cole turned on Cliff Mortensen and attempted to start a fight with him. While Mr. Nowell, Mr. Mortensen and Mr. Diamond were attempting to restrain Mr. Cole, he ran to the door of the office, opened it, shouted that there was a fight and that there were three to one against him, and called for someone to come to his aid. Shortly thereafter Mr. Cole calmed down and resumed his seat at the Directors' meeting.

Everett Nowell resumed the discussion of the utilities problem following which Cash Cole moved that the Management of Fairview Manor be given authority to do anything which it felt necessary, including the purchasing of equipment and the borrowing of such sums of money as was felt necessary and to do all other things which the Management deemed necessary to remove the danger of the development of a critical heat and power situation at Fairview Manor. Cliff Mortensen stated that the motion would be more acceptable if it were put in a form which framed a definite proposal as to what steps would be taken by the Management to prevent a critical utilities situation from developing. Mr. Mortensen stated that as presented the motion would give blanket authority to the Management to take any steps desired with regard to the heat and power at Fairview regardless of the cost of such steps. Cash Cole then repeated the Motion. Everett Nowell called for a vote. Everett Nowell and Cash Cole voted in favor. Cliff Mortensen voted against.

Exhibit A—(Continued)

Cash Cole then moved that the meeting be adjourned. Everett Nowell and Cash Cole voted in favor of the motion. Cliff Mortensen voted against the motion. Cash Cole then stated that the meeting was adjourned. Cliff Mortensen pointed out that under the Directors' voting agreement he had one vote and Cash Cole and Everett Nowell together had one vote and that therefore the meeting was not adjourned. Cliff Mortensen further stated that he had certain motions that he desired to make. Mr. Mortensen then moved that there be made available for consideration by the Board of Directors a full and complete report of all financial transactions of the corporation, including an itemized statement of its income and expenditures from the date of its inception to the present time. After a discussion, during which Everett Nowell and Cash Cole stated that a financial statement would be made available, Cliff Mortensen moved that the meeting be adjourned to meet in the office of the CPA of the Corporation, Herb Lofquist, Seattle, Washington, on November 12, 1952, at the hour of 2:00 p.m. in order that the Board of Directors could probably consider the financial affairs of the Corporation. Following an extended stream of abuse from Cash Cole, Cliff Mortensen requested that Everett Nowell, who was acting as President, call for a vote on his motion. Cash Cole stated that the meeting had been adjourned. Everett Nowell refused to call for a vote on the ground that the meeting had been adjourned. Cliff Mortensen then moved that in the event that

Exhibit A—(Continued)

any motions made at the meeting could not be acted upon because of a deadlock among the Directors that all such matters be referred to Ken Kadow for his decision in accordance with the agreement of the Directors dated June 16, 1950, and that the decision or the determination made by Ken Kadow be adopted as the action and decision of the Board of Directors of this Corporation as agreed to by the Directors, and in the event that Mr. Kadow was not available, that such matters be referred to Roy Sumpter for his decision and determination, all in accordance with the agreement of June 16, 1950. Cash Cole then launched a further stream of profanity and abuse directed against the Mortensen interests and Mr. Diamond threatened Cliff Mortensen with criminal action, and threatened to disbar Mr. Diamond. Mr. Cole then stated that the meeting had previously adjourned, that no further business would be considered by the Board of Directors and Mr. Cole then walked out of the meeting. Everett Nowell remained at the meeting but stated that he would refuse to consider any further motions on the ground that the meeting had been adjourned.

Mr. Mortensen moved that Cash Cole and Everett Nowell each of them be required forthwith to return to the Corporation all monies withdrawn by either of them or taken by either of them from the Corporation whether by way of alleged salary or alleged expenses or otherwise, and that a full and

Exhibit A—(Continued)

complete accounting certified by a CPA for the Corporation be rendered as to all sums drawn by or charged to the Corporation by either of them, and that Cash Cole and Everett Nowell be furnished copies of said accounting with copies to each of the directors and stockholders. Everett Nowell refused to act on this motion on the ground that the meeting had been adjourned. Mr. Mortensen then moved that Cash Cole and/or Everett Nowell and/or Bayview Realty, Inc., or either or all of them be removed from the Management or operation of Fairview Manor and that the Management of said project be placed in the hands of the Manager or Management selected by the Directors, or if the Directors could not agree, in accordance with the provisions of the agreement between the Directors dated June 16, 1950, when they cannot agree upon any action for the benefit of the Corporation. Everett Nowell refused to act upon this motion on the ground that the meeting had been adjourned.

At this point Mr. Cash Cole returned to the meeting and attempted to further disturb it by profane and abusive language. Mr. Mortensen moved that the minutes of the special combined meeting of stockholders and Directors held on June 11 and 12, 1951, be recognized as the lawful minutes of the Corporation and that they be placed in full force and effect as provided therein. Mr. Nowell refused to consider this motion on the ground that the meeting had been previously adjourned. Cash Cole urged Everett Nowell to leave the meeting since no further busi-

Exhibit A—(Continued)

ness could be transacted. As Mr. Mortensen began to present an additional motion Mr. Cole and Mr. Nowell left the meeting. Immediately thereafter, Mr. Cliff Mortensen, Mr. Josef Diamond and Mr. J. E. Swanson left the office without further incident.

/s/ J. E. SWANSON, JR.

[Endorsed]: Filed August 14, 1953.

[Title of District Court and Cause.]

ORDER APPOINTING RECEIVER

This Cause Coming on to Be Heard on motion of the plaintiffs herein by its attorneys for appointment of a receiver and pursuant to the prayer of the complaint filed in this cause and upon the affidavit or affidavits filed in support thereof and in opposition thereto, and the testimony produced in open court; and the court having heard statements of counsel and being otherwise fully advised in the premises, Finds:

1. That this is a stockholders' suit instituted by the corporate plaintiff and certain stockholders on their own behalf and on behalf of other stockholders; and that this case involves the Fairview Manor, located at Fairbanks, Alaska, as more fully indicated in the complaint filed herein, and further relief is sought.

2. That it appears that Cash Cole, one of the defendants in this case, has become ill since the commencement of the trial herein and is unable to proceed with his testimony on behalf of the plaintiffs or on his own behalf; and that he has been one of the persons managing the operation of said Fairview Manor, and is now unable to so manage it in view of his illness.

3. That the plaintiffs have prayed for the appointment of a temporary receiver or a permanent receiver under their complaint; and have moved during the trial for the appointment of a temporary receiver until said defendant Cash Cole is able to appear at a trial in this court and testify under the subpoena issued at the request of the plaintiffs.

4. That the individual plaintiffs in this cause are owners of 50 per cent of the common stock of said corporation and seek, in addition to the appointment of a receiver, an accounting from the defendants Cash Cole, Everett Nowell and Bayview Realty. Inc.; and it appears that an impasse exists in the conduct of said corporation's affairs due to deadlock and dissension in the Board of Directors and among the stockholders; that there is uncertainty as to who comprise the Board of Directors; that there may be improper disposition of corporate funds and dissipation of corporate assets; that there may be impairment of corporate property and usurpation of control and possession of corporate assets, income and profits by the defendants and exercise by one or more of them of corporate powers without

authority of the Board of Directors and the stockholders, contrary to the provisions of the corporate charter, bylaws and the General Laws of the Territory of Alaska.

It Is Now Therefore Ordered, Adjudged and Declared that Robert E. Sheldon, of the City of Fairbanks, Alaska, be and is hereby appointed receiver for the property involved in the above-entitled cause, and all assets and corporate records of the plaintiff corporation and its business, together with all improvements located thereon, and the fixtures, equipment, merchandise, stock and personal property located therein, and the rents, issues and profits thereof with all the usual rights, powers and duties of receivers in equity in like cases; that upon entering upon his duties said receiver shall file with this court a bond in the penal sum of \$30,000.00 as security, to be approved by this court, and conditioned upon the faithful performance of his duties as such receiver.

It Is Further Ordered that any party or parties now in possession of said premises, or that may come into possession of said premises and the improvements thereon, attorn to said receiver.

Dated at Fairbanks, Alaska, this 8th day of October, 1953.

/s/ HARRY E. PRATT,
District Judge.

[Endorsed]: Filed and entered October 8, 1953.

[Title of District Court and Cause.]

NOTICE OF WITHDRAWAL OF ATTORNEYS

To: Messrs. Lycette, Diamond & Sylvester, and to
Messrs. Collins & Clasby, attorneys for plain-
tiffs:

Please be advised that the undersigned attorneys,
Cake, Jaureguy & Hardy and Nicholas Jaureguy,
hereby withdraw as associate attorneys for defen-
dants Cash Cole, Everett Nowell and Bayview
Realty, Inc.

Dated this 15th day of December, 1953.

CAKE, JAUREGUY & HARDY,
/s/ NICHOLAS JAUREGUY,

Formerly Attorneys for
Above Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 17, 1953.

[Title of District Court and Cause.]

NOTICE OF DEFAULT AND DEMAND

To: Cash Cole, Fairview Manor Building No. 2,
Fairbanks, Alaska.

Bayview Realty, Inc., Fairview Manor Building
No. 2, Fairbanks, Alaska.

Fairview Development, Inc., Fairview Manor
Building No. 2, Fairbanks, Alaska.

Everett Nowell, P. O. Box 3365, Seattle 14,
Washington.

John E. Hedrick, Attorney for Everett Nowell,
E. J. Vance Bldg., Seattle, Washington.

Bell & Sanders, Warren A. Taylor, Attorneys
for Cash Cole and Bayview Realty, Inc., 3241½
3rd Avenue, Fairbanks, Alaska.

J. Hellenthal, attorney for defendants, P. O.
Box 941, Anchorage Alaska.

Stephen J. Morrissey, attorney for defendants,
J. J. Vance Bldg., Seattle, Washington.

Notice Is Hereby Given that default has been made in the payment of the installment of \$10,000.00 due on or before December 31, 1953, to Nelse Mortensen, Cliff Mortensen, and Frank Henderson under the terms and provisions of the agreement contained in the stipulation filed in the above cause on October 9, 1953, and approved and embodied in the final decree entered in said cause on October 10, 1953. You are hereby further notified that Cash Cole, Everett Nowell, and/or Bayview Realty, Inc., have made further default under the terms of said agreement by failing and refusing to place in escrow all of the capital stock of Fairview Development, Inc. (except 100 share of preferred stock), consisting of 450 shares purchased by said persons under the terms of said agreement and 450 shares of said capital stock theretofore owned by said Bayview Realty, Inc., Everett Nowell, and/or Cash Cole.

Now Therefore, pursuant to the terms of said agreement and by reason of said defaults, said Nelse Mortensen, Cliff Mortensen and Frank Henderson have heretofore and do hereby declare the

full balance of the obligation provided under paragraph 2 thereof, to wit: \$89,000.00, now immediately due and owing, and do hereby require and demand the holder or holders of said capital stock, consisting of 900 shares of common stock of said Fairview Development, Inc., to be delivered to them or any one of them without further notice as their property, in full satisfaction of said balance now due and owing.

Dated this 9th day of February, 1954.

/s/ NELSE MORTENSEN,

/s/ CLIFF MORTENSEN,

/s/ FRANK V. HENDERSON.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 13, 1954.

[Title of District Court and Cause.]

MOTION TO SHOW CAUSE

Now Come the plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, by their attorneys, and move that the court enter an order herein directing the defendants Cash Cole and Bayview Realty, Inc., and each of them, to show cause why they should not be held in contempt of court for failure to comply with the terms and provisions of the final decree entered in this cause on October 10, 1953, and settlement agreement evidenced by the stipulation filed herein on October 9, 1953, and incorporated in said final decree, and failure to deliver the capital stock of Fairview Development, Inc., owned by them, or one of them, as provided in

said decree and stipulation; or in the alternative that an order be entered herein directing said Cash Cole and Bayview Realty, Inc., and each of them, to assign and deliver the certificates evidencing said capital stock of Fairview Development, Inc., owned by them, or either of them, to said plaintiffs Nelse Mortensen, Cliff Mortensen and Frank V. Henderson without delay, conveying thereby all their right, title, and interest in and to said capital stock in payment and satisfaction of the obligation, which said defendants agreed to secure in said stipulation by delivery of said capital stock.

In support of said motion reference is hereby made by said plaintiffs to the settlement agreement embodied in the stipulation filed in this cause on October 9, 1953, the final decree of this court approving said settlement and directing its execution entered herein on October 10, 1953, affidavits filed by plaintiffs in opposition to motion of said Cash Cole and Bayview Realty, Inc., to set aside said stipulation and vacate said final decree, and the pleadings heretofore filed in this cause and the proceedings heretofore had therein.

Dated at Fairbanks, Alaska, this 12th day of February, 1954.

JOE DIAMOND, and
EARLE ZINN, COLLINS AND
CLASBY.

By /s/ WALTER SCZUDLO,
Of Counsel for Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 13, 1954.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 3532

FAIRVIEW DEVELOPMENT, INC., a Corporation,

Plaintiff,

vs.

NELSE MORTENSEN-ALASKA, INC., a Corporation; NELSE MORTENSEN and ALMA MORTENSEN, His Wife; CLIFF N. MORTENSEN and DOROTHY MORTENSEN, His Wife; FRANK V. HENDERSON and MABEL R. HENDERSON, His Wife, Individually and as Co-Partners, d/b/a NELSE MORTENSEN-ALASKA CO., and as Trustees of NELSE MORTENSEN-ALASKA, INC., a Corporation,

Defendants.

COMPLAINT

Plaintiff for its first cause of action alleges:

I.

That Fairview Development, Inc., is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, with its principal place of business in Fairbanks, Alaska. That the said corporation is the owner of a leasehold of real property in the Territory of Alaska, which leasehold is improved by an apartment building. That

the plaintiff corporation is not engaged in business in the State of Washington.

II.

That Nelse Mortensen-Alaska, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of business in Seattle, King County, Washington. That the plaintiff alleges on information and belief that Nelse Mortensen-Alaska, Inc., a corporation, was dissolved by the individual defendants herein; that the individual defendants herein were all the directors and shareholders thereof; that possession and control of all of the assets of the corporation was taken by the said individual defendants; that all of the liabilities of the corporation were assumed by them; that the individual defendants hold the assets of the corporation as trustees for the corporation and that as trustees they are obligated for the liabilities of the corporation.

III.

That the defendants, Nelse Mortensen and Alma Mortensen, are now and at all times herein mentioned have been husband and wife, residing in King County, Washington, and as such constitute a marital community; that all of the acts of Nelse Mortensen hereinafter mentioned were done and performed for the use and benefit of himself individually and of the marital community composed of Nelse Mortensen and Alma Mortensen, his wife.

IV.

That the defendants, Cliff N. Mortensen and Dorothy Mortensen, are now and at all times herein mentioned have been husband and wife, residing in King County, Washington, and as such constitute a marital community; that all of the acts of Cliff N. Mortensen hereinafter mentioned were done and performed for the use and benefit of himself individually and of the marital community composed of Cliff N. Mortensen and Dorothy Mortensen, his wife.

V.

That the defendants Frank V. Henderson and Mabel R. Henderson are now and at all times herein mentioned have been husband and wife, residing in King County, Washington, and as such constitute a marital community; that all of the acts of Frank V. Henderson hereinafter mentioned were done and performed for the use and benefit of himself individually and of the marital community composed of Frank V. Henderson and Mabel Henderson, his wife.

VI.

That the individual defendants, Nelse Mortensen, Cliff N. Mortensen, and Frank V. Mortensen, individually and as agents of their respective marital communities are co-partners d/b/a Nelse Mortensen-Alaska Co.

VII.

Plaintiff is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, defendant Nelse Mortensen-Alaska, Inc., is

a corporation organized and existing under and by virtue of the laws of the State of Washington, all of the individual defendants are citizens of the State of Washington. The matter in controversy exceeds, exclusive of interest and costs, the sum of Thirty Thousand (\$30,000.00) Dollars.

VIII.

That the plaintiff corporation possessed and now possesses a lease from the City of Fairbanks, Territory of Alaska, real property described as follows:

Commencing at Corner No. 2 of U. S. Survey No. 438 Fairbanks Townsite; thence proceeding S 0° 01' West a distance of 219.22' to the point of beginning and corner No. 1 of this description; thence, S 89° 59' East 990.00 feet; thence, on a curve to the left of 10.00 feet radius an arc distance of 15.71 feet; thence, N. 0° 01' East, 90.00 feet; thence on a curve to the right of 1440 feet radius an arc distance of 490.00 feet; thence on a curve to the left of 13.10 feet radius an arc distance of 17.08 feet; thence N. 55° 12' West 396.68 feet; thence on a curve to the left of 10.00 feet radius an arc distance of 15.71 feet; thence, S. 34° 48' West 385.92 feet; thence on a curve to the right of 501.67 feet radius an arc distance of 483.47 feet; thence N. 89° 59' West 305.80 feet; thence S. 0° 01' West 287.10 feet; thence S. 89° 59' East, 200.00 feet to corner No. 1 and point of beginning.

IX.

That on or about July 10, 1950, plaintiff as owner entered into a written construction contract with the defendant Nelse Mortensen-Alaska, Inc., for the construction of a multiple housing or apartment building on the above-described property, said building to be known as Fairview Manor Apartments, for an agreed price of Three Million Eighty Thousand (\$3,080,000.00) Dollars, a copy of which contract is attached hereto marked Exhibit A and by this reference made part hereof.

X.

That after the execution of the contract above referred to and at a time unknown to the plaintiff the individual defendants dissolved Nelse Mortensen-Alaska, Inc., and the individual defendants Nelse Mortensen, Cliff N. Mortensen, and Frank V. Henderson purporting to act as Trustees of the said Nelse Mortensen-Alaska, Inc., and as co-partners doing business as Nelse Mortensen-Alaska Co., undertook to perform the obligations of the contract, assumed all the liabilities of the contract, performed certain work in the construction of the building to be constructed pursuant to the terms of the contract and obtained all of Three Million Eighty Thousand (\$3,080,000.00) Dollars from the plaintiff.

XI.

That by the terms and provisions of the said contract, the Contractors, Nelse Mortensen-Alaska, Inc., undertook to provide the owner with the

assurance of the completion of the contract in the form of an indemnity agreement in the amount of Two Hundred Ninety-Five Thousand Nine Hundred Twenty (\$295,920.00) Dollars and the payment of the following items in connection with the project:

- (a) Interest on the mortgage loan during construction;
- (b) Insurance required during construction;
- (c) F. H. A. mortgagees insurance premiums;
- (d) F. H. A. examination fee;
- (e) F. H. A. inspection fee;
- (f) Financing expense;
- (g) Title and recording expense, and Nelse Mortensen-Alaska, Inc., further agreed in the event the owner paid any or part of the above items (a) to (g), inclusive, the owner would receive a corresponding credit on the contract price.

XII.

That the plaintiff paid to the defendants the entire sum of Three Million Eighty Thousand (\$3,080,000.00 Dollars for the construction of said housing project.

XIII.

That the defendants refused and neglected to pay during the construction work on said housing project, although required so to do by the contract herein referred to, the following items, to wit: Interest on mortgage due January 1, 1952, Nine Thou-

sand Seventy-Five and 26/100 (\$9,075.26) Dollars and thirty days delinquent interest in the amount of Thirty and 25/100 (Dollars); interest on Mortgage due February 1, 1952, Nine Thousand One Hundred Ninety-Four and 76/100 (\$9,194.76) Dollars. Real estate taxes levied August 1, 1951, Thirty-One Thousand Six Hundred Twelve (\$31,612.00) Dollars; that due to the neglect, failure and refusal of the defendants to pay said items, plaintiffs herein made the payments. That repeated demands have been made on defendants to reimburse plaintiffs for said payments but defendants have refused and neglected to so reimburse plaintiffs contrary to the term of the contract herein referred to.

XIV.

That the defendants in their respective capacities have failed and neglected to complete the construction of the Fairview Manor Apartment project, or housing project according to the terms and provisions of the contract. The said defendants have failed among other items to comply with the terms and provisions of the contract in the following respects:

1. The floor elevations vary as follows: Building No. 1 is nine (9) inches lower than the plans call for.

Building No. 2 is one foot two and one-half inches (1' 2 1/2") lower than the plans call for.

Building No. 3 is three and one-half inches lower than the plans call for.

Building No. 4 is seven (7") inches lower than the plans call for.

2. Ground floor level varies in each building from $3\frac{1}{2}$ to $4\frac{1}{2}$ inches.

3. Front sidewalk on the "New C. A. A. Road" is built below the highway at an elevation from $12\frac{1}{2}$ inches at the east end of Building No. Two to 23 inches at the west end of Building No. One.

4. Plans and specifications require one thousand four hundred fifty (1,450) feet of tree planting or hedges; two planting areas one 6 x 30 feet and the other 6 x 15 feet with concrete curbs, topsoil and shrubbery; eight thousand (8,000) square feet of sidewalk and cross walk; twelve (12) inches of gravel required under curbs, all of which was omitted.

5. Closets of Apartment E were eliminated and space placed in the hallway.

6. One thousand fifty-six (1,056) lineal feet of hand rail on side of all stairways; self-closing apartment entrance doors on all apartments, were not provided.

7. Six (6) inch concrete base in all garages were not furnished.

8. Four thousand (4,000) square feet of colotyle on the various bathrooms in the apartments was not provided.

9. Six by six wood bumpers in all garages were not supplied.

10. Plans required wardrobe sliding door frames and casings to be oak. Defendants supplied pine or fir.

11. Plans require six by six feet WF 15 .5# steel I beam over stairs and end bedroom. 4" x 12 timber was substituted.

12. Electric dryers in laundry rooms were vented into garages instead of through the walls.

13. Aluminum roofing on all buildings not grounded at all. Plans require each building to be grounded in three places.

14. Closets required to have six spruce or hemlock shelves, only four provided per closet.

15. Lettering on the doors as provided in the plans and specifications was omitted.

16. The proper hardware on fire doors in the basement was not provided.

17. Door closures of the rotary piston or ratchet and pinion type, on the doors of the apartment, three hundred ninety-two (392) in number, were omitted.

18. Rail brackets, card plates, numerals, letters, hooks, and fire extinguishers as provided in the plans and specifications of the contract were omitted.

19. Plans require two water wells, only one was provided.

20. Play yards and equipment as required were omitted.

21. Grading and drainage in compliance with the plans and specifications so that the water will drain away from the building was ignored.

22. Surface water pockets without any drainage contrary to the plans and specifications are numerous.

23. Plans and specifications require the siding to be three-eighths inch waterproof plywood, with shiplap joints and all joints bedded in thick lead and oil paint, that the siding should be attached with hot dip galvanized nails, all of which was not followed.

24. No electrical outlets are provided in the public hallways as required by the plans and specifications.

25. The surrounding grounds were not provided with grass and prepared by removing stones.

26. Over the top of the fire doors in the basements, several heating and electrical pipes on the ceiling pass through the wall; the void between these various pipes was not filled, making a fire hazard of the worst type.

27. Buildings No. 1 and No. 2 are 15' 5" too close to the road.

28. Plans and specifications require 8 feet parking strips outside of sidewalk with trees planted each 50 feet, none of which was supplied.

29. Plans and specifications required six inch curb and gutter along the entire street front, one thousand seven hundred ten (1,710) lineal feet of this was not supplied. One thousand seven hundred (1,700) feet of said curbs and gutters were not provided on the rear street.

30. In each building, no trenches in the floating slabs were provided as shown on the drawings to accommodate sewage outflow, therefore to accomplish the outflow essential, the reinforcement steel in the slab was cut and the concrete in the trenches was then provided after the slab had been poured, layed and set and the reinforcement steel was not placed properly, thereby resulting and producing great settlement of the building slab foundation and producing warping and uneven settlement of all the buildings.

That many of other failures, neglect, poor workmanship on the part of the defendants have occurred which are presently unknown to these plaintiffs. That as a result thereof and of the above-enumerated deficiencies the said building has been depreciated from the value as expected by the plans, specifications and contracts and by reason of the foregoing facts, plaintiff has been damaged in the sum of Five Hundred Fifty Thousand (\$550,000.00) Dollars.

XV.

Because of the wrongful refusal of the defendants to complete their said contracts according to the plans and specifications, it became necessary for the

plaintiff to complete and cause certain work to be completed. In completing the work the plaintiff expended the sum of One Hundred Thousand (\$100,000.00) Dollars which was the reasonable value of completing the work that the defendants failed to do although agreeing to do.

Wherefore plaintiff demands judgment against the defendants and each of them for the sum of Six Hundred Ninety-Nine Thousand Nine Hundred Twelve and 27/100 (\$699,912.27) Dollars with interest and that plaintiff have and recover their costs and disbursements herein.

MORRISSEY, HEDRICK,
ROBERTS & DUNHAM,
JOHN E. HEDRICK,
Attorneys for Plaintiff.

EXHIBIT A

FHA Form No. 2442-W
(Section 608)
(Revised May, 1946)

Construction Contract—"Lump Sum"

This Agreement made the 10th day of July, 1950, by and between Nelse Mortensen-Alaska, Inc. (hereinafter called the "Contractor"), and Fairview Development, Inc. (hereinafter called the "Owner").

Exhibit A—(Continued)

Witnesseth, that the Contractor and the Owner for the consideration hereinafter named agree as follows:

Article 1—Scope of Work

The Contractor shall furnish all of the materials and perform all of the work within the property lines, shown on the Drawings numbered 1 to 14, M-1 to M-4, E-1 to E-4, P-1 to P-4 and in the Specifications, the pages of which are numbered 1 to 72, which said specifications include the "General Conditions of the Contract" consisting of Articles one to 10 of the Standard form, current edition, of the "American Institute of Architects" (except as specifically modified in said Specifications) and any Supplemental General Conditions attached thereto. If anything in the said "General Conditions of the Contract" is inconsistent with this instrument, this instrument shall govern.

The said documents have been prepared by G. C. Field therein and hereinafter called the Architect.

A master set of said Drawings and Specifications entitled "Drawings and Specifications of Fairview Manor FHA Project No. 130-42013, a Rental Housing Project," identified by the Federal Housing Commissioner (hereinafter referred to as the "Commissioner") and by other parties, shall be placed on file with the Commissioner and when so filed shall govern (except as herein modified) in all matters which may arise with respect to such Drawings and

Exhibit A—(Continued)

Specifications and General Conditions, and the provisions thereof.

Article 2—Time of Completion

The work to be performed under this Contract shall be commenced within 30 days from date of this Agreement, and shall be completed to the satisfaction of the Architect and the Owner within 16 months from the beginning. In no event, however, shall the work to be performed under this Contract be considered to be completed until all construction items called for in the Drawings and Specifications have been fully completed and the contract price paid in full. It is expressly agreed, however, that in no event shall the Contractor or the Surety be liable for any damage resulting from, or, for the construction or repair of, any work damaged or destroyed by any act of God or the public enemy or mobs or riots or civil commotion; and that the Contractor and the Surety shall not be liable for any cessation of work or delay in performance of work caused by direct order of the United States Government or any of its Agencies. Any extension of time authorized or approved by FHA shall extend the completion date hereof.

Article 3—The Contract Sum

The Owner shall pay the Contractor for the performance of the Contract, subject to additions and

Exhibit A—(Continued)

deductions provided herein on account of construction the sum of \$3,080,000.

All requests for changes in the Drawings and Specifications must be in writing signed by the Owner and the Lender and shall be conditioned upon the approval of the Commissioner, which approval may be subject to such conditions and qualifications as the Commissioner in his discretion may prescribe, it being understood that the Commissioner at all times has the right to require compliance with the original Drawings and Specifications.

The Contractor shall assume full responsibility for the maintenance of such landscaping as may be required by the Drawings and Specifications until such time as both parties to this Contract shall receive notice in writing from the Commissioner that the work has been satisfactorily completed. The Owner hereby agrees to make available to the Contractor, without cost to the latter, such facilities as water, hose, and sprinkler.

Article 4—Schedule of Payments

Applications for payments under this Contract are to be made by the Contractor to the Owner, approved by the architect, in quadruplicate on FHA Form No. 2448-W, on or about the first day of each month after the commencement of work hereunder, for payment for work done during the preceding month or part thereof. The sum to which the Contractor shall be entitled upon any such payment

Exhibit A—(Continued)

shall be the total of the purchase price of unin-stalled materials stored on the mortgaged property in a manner acceptable to the Commissioner plus the cost of the portions of the work acceptably completed, as approved by the Commissioner, computed in accordance with the amounts assigned to the several items in the Payment Breakdown, hereto annexed marked Exhibit A, less 10% and less prior advances. Applications shall be filed by the Contractor at least 10 days before the date upon which payment is desired. The Contractor shall only be entitled to payment in the amount approved by the Lender and the Federal Housing Commissioner with respect to said application.

If the Total of the Payment Breadown Items in the Payment Breakdown exceeds the total cash contract price, then the cash sum payable to the Contractor upon any payment as estimated from the Payment Breakdown Items shall be reduced in the same proportion as the total of such Payment Breakdown Items exceeds such total cash contract price. If the Total of the Payment Breakdown Items in the Payment Breakdown are less than the total cash contract price, then the cash sum payable to the Contractor upon any payment as estimated from the Payment Breakdown Items shall be increased in the same proportion as such total cash contract price exceeds such Total of the Payment Breakdown Items.

Upon completion of the improvements, including

Exhibit A—(Continued)

all landscape requirements, the balance due the Contractor hereunder shall be payable to the Contractor upon the expiration of 30 days from the date of final completion and acceptance of the project by the Owner with the approval of the Commissioner and the Lender: Provided, however, That this contract shall not be considered complete for purposes of final payment unless and until, all the work requiring inspection by municipal or other governmental authorities having jurisdiction, have been duly inspected, and approved by such authorities and by the applicable Board of Fire Underwriters, if any, and all requisite certificates of occupancy and other approvals have been duly issued: And provided further, That the Owner or Lender may withhold approval of final payment until after the expiration of any period which laborers, subcontractors, and materialmen may have for filing notice of Mechanics' Liens, and until after satisfactory completion of all off-site utilities and streets as required by the Lender and Federal Housing Commissioner.

Article 5—Cessation of Work

The Contractor understands that the work herein provided to be done is to be financed by a building loan secured by a mortgage to be insured by the Federal Housing Commissioner, the terms of which are set forth in a Building Loan Agreement between the Owner as Borrower, and The National Bank of Commerce of Seattle as Lender. The Con-

Exhibit A—(Continued)

tractor, in the event of the failure of the Owner to perform its obligations to the Lender under said Building Loan Agreement, shall, upon receipt of written notice from the Lender that it has elected not to proceed with the work, immediately cease performance of this Construction Contract and all its obligations thereunder, and this Contract shall terminate upon receipt by the said Contractor of said notice.

In such event, provided the Contractor is not in default under this Construction Contract, the Contractor may within fifteen (15) days after receipt of such notice submit directly to the Lender an application for advances to pay claims for work done and materials furnished up to the time such written notice was received by the Contractor as aforesaid, and the Contractor shall be entitled to receive such amount as may be approved by the Federal Housing Commissioner and the Lender to be paid to the Contractor as and for the value of such work and materials.

Article 6—The Contract Documents

The Drawings and Specifications, including the General Conditions and Supplemental General Conditions, together with this Agreement and Exhibits hereto attached, form the Contract and all of said documents are as fully a part of the contract as if hereto attached or herein repeated.

Exhibit A—(Continued)

Article 7

Anything to the contrary notwithstanding, it is agreed by and between the parties hereto that whenever any statements, documents, or data of any sort, nature, or description are required under this Contract to be submitted to the Architect or Owner, or both, duplicates of such statements, documents, or data shall be likewise submitted to the Commissioner and Lender, if requested by them or either of them or to their duly-constituted representatives. It is further agreed by and between the parties hereto, that whenever it is provided in this Contract that the approval of, or the certificate or order from the Architect shall be received either as a condition precedent to any action being taken or not taken, as the case may be or as a prerequisite to the exercise by the parties hereto of any right or rights hereunder, including the right to receive payment under this Contract, the Commissioner or the Lender may require that such approval and such certificate or order shall, before being effective, be accompanied by the written approval of the Commissioner and the Lender or their duly authorized representatives.

Article 8—Waiver of Mechanics' Lien

The Contractor hereby specifically agrees that no mechanics' liens or other claim or claims shall be filed or maintained by it against the said buildings

Exhibit A—(Continued)

and improvements and real estate appurtenant thereto for or on account of any work or labor done or materials furnished under the Contract or otherwise, for, toward, in or about the erection and construction of the said buildings and improvements.

Article 9—Receipts and Releases of Lien

The Owner may require that the Contractor obtain and attach to each application for payment acknowledgments of payment down to the date covered by the last advance, from all subcontractors and materialmen dealing directly with the Contractor, and concurrently with final payment for the entire Project according to the Schedule of Payments may require that the Contractor obtain in duplicate an affidavit and releases of lien, in the form required under the lien law of the State wherein the premises are situated. Said releases of lien, if required, shall cover all work, labor, and materials including equipment and fixtures of all kinds done or performed for or furnished to the Borrower, the Contractor, subcontractors, and materialmen. The Contractor shall execute an affidavit accompanying such releases of lien.

Article 10

The Contractor agrees not to assign this Contract or any amount payable hereunder or to sublet the whole or substantially the whole of this Contract except with the prior written consent of the Owner and the Lender. The contractor also agrees upon request to disclose to the Lender the names of all

Exhibit A—(Continued)

persons with whom it has contracted or intends to contract or hereafter contracts with respect to work and materials required to be furnished hereunder. The Contractor hereby agrees that the Owner may assign this Contract or any rights arising hereunder, including any guarantees or warranties of workmanship or material, to the Lender or the Federal Housing Commissioner.

Article 11

The Contractor (1) understands that the wages to be paid laborers and mechanics employed in the construction of the Project are required by the provisions of Section 212 (a) of the National Housing Act, as amended, to be not less than the wages prevailing in the locality in which the work was performed for corresponding classes of laborers and mechanics employed on construction of a similar character, as determined by the Secretary of Labor with respect to this Project, and (2) hereby states that he has read the aforesaid determination by the Secretary of Labor and is fully familiar with the same.

The Contractor agrees as a condition precedent to the payment to him of any advance hereunder to submit to the Commissioner (1) with each application for advance prior to the final application, a certificate or certificates executed by him and in form approved by the Commissioner, certifying that all laborers and mechanics employed in the construction of the Project whose work is covered by this

Exhibit A—(Continued)

or any previous application and who have been paid in whole or in part on account of said employment, have been paid at a rate not less than the rate of wages prevailing in the locality in which the work was performed for the corresponding classes of laborers and mechanics employed in construction of a similar character, as determined by the Secretary of Labor with respect to this Project, and (2) with the final application for advance, a certificate or certificates in form satisfactory to the Commissioner, certifying that the Project has been fully constructed in accordance with the provisions of this Contract and that all laborers and mechanics employed in the construction of the completed Project have been paid not less than the wages prevailing in the locality in which the work was performed for the corresponding classes of laborers and mechanics employed on construction of a similar character, as determined by the Secretary of Labor with respect to this Project.

Article 12

Notwithstanding any other provision of this Agreement, or the Specifications which form a part hereof, the Contractor shall furnish at its own expense all building and other permits, licenses, tools, equipment, temporary structures, and water necessary for the construction of the Project as required.

The Contractor shall also furnish to the Owner and the Lender, with duplicate copy to the Commissioner, a survey showing the location on the site

Exhibit A—(Continued)

of the improvements constructed thereon. Such survey shall be supplied with the application of the Contractor for the first payment on each unit or building, not theretofore located on said survey, and with the application of the Contractor for final payment on the completed Project. The survey accompanying the request for final payment must show the exact location of all water, sewer, gas, and electric mains, and of all easements for such utilities then existing. Such surveys shall be prepared by a licensed surveyor who shall certify that the Project is installed and erected entirely upon the land covered by the Mortgage and within the building restriction lines, if any, on said land, and does not overhang or encroach upon any easement or right-of-way of others.

Article 13—Assurance of Completion

The Contractor agrees to furnish the Owner with assurance of completion in the form of indemnity agreement in the amount of \$295,920.00, and payment of the following items in connection with the project:

- (a) Interest on the mortgage loan during construction;
- (b) Insurance required during construction;
- (c) FHA mortgage insurance premiums;
- (d) FHA examination fee;
- (e) FHA inspection fee;
- (f) Financing expense;
- (g) Title and recording expense.

Exhibit A—(Continued)

In the event the owner has paid any or part of the above items (a) through (g), inclusive, then the owner shall receive a corresponding credit on the contract price.

Article XIV.

Notwithstanding any other provision herein with reference to payment, payments on this contract are to be made by the owner turning over to the contractor all monies and advances received by or made available to owner from the lending institution under the insured mortgage covering this project.

FAIRVIEW DEVELOPMENT,
INC.

By /s/ EVERETT NOWELL,
President.

By CASH COLE,
Secretary.

NELSE MORTENSEN-
ALASKA, INC.,

By CLIFF N. MORTENSEN,
President.

By NELSE MORTENSEN,
Secretary.

[Endorsed]: Filed July 23, 1953.

[Endorsed]: Filed April 3, 1954.

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision

No. 3532

FAIRVIEW DEVELOPMENT, INC., a Corpora-
tion,

Plaintiff,

vs.

NELSE MORTENSEN-ALASKA, INC., a Corpora-
tion,

Defendants.

STIPULATION AND ORDER OF DISMISSAL

It Is Hereby Stipulated by and between the plaintiff, Fairview Development, Inc., by and through its attorneys of record, and the defendants, Nelse Mortensen-Alaska, Inc., a corporation; Nelse Mortensen and Alma Mortensen, his wife; Cliff N. Mortensen and Dorothy Mortensen, his wife; Frank V. Henderson and Mabel R. Henderson, his wife, individually and as co-partners, d/b/a Nelse Mortensen-Alaska Co., and as Trustees of Nelse Mortensen-Alaska, Inc., a corporation, by and through their attorneys of record, that the above-entitled action has been fully settled and compromised, and that the same should be dismissed with prejudice and without costs.

LYCETTE, DIAMOND &
SYLVESTER,
Attorneys for Defendants.

By /s/ JOSEF DIAMOND.

MORRISSEY, HEDRICK,
ROBERTS & DUNHAM,
Attorneys for Plaintiff.

By /s/ JOHN E. HEDRICK.

ORDER

Based upon the foregoing Stipulation,

It Is Hereby Ordered, Adjudged and Decreed
that the above-entitled action be, and the same is
hereby, dismissed with prejudice and without costs.

JOHN C. BOWEN,
Judge.

Approved:

MORRISSEY, HEDRICK,
ROBERTS & DUNHAM.

By JOHN E. HEDRICK,
Attorneys for Plaintiff.

Presented and Approved by:

LYCETTE, DIAMOND, &
SYLVESTER,

By JOSEF DIAMOND,
Attorneys for Defendants
R. E. Callahan.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division, Oct. 28, 1953.

MILLARD P. THOMAS,
Clerk.

[Endorsed]: Filed April 3, 1954.

[Title of District Court and Cause.]

No. 7298

MOTION TO STRIKE NOTICE OF APPEAL

Now Come the plaintiffs, Fairview Development, Inc., an Alaska Corporation; Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson, individually and as directors and stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., by their attorneys, Collins and Clasby, and move that the notice of appeal filed in the above-entitled cause on or about May 10, 1954, from the final judgment and decree entered in said cause, and from the order entered May 7, 1954, overruling defendants' motion to set aside and rescind the stipulation upon which said judgment was based and said final judgment and decree, be stricken as to Fairview Development, Inc., plaintiff in the above-entitled cause, because said plaintiff has at all times been represented in this cause by Collins and Clasby and Josef Diamond and Earle Zinn of Lycette, Diamond & Sylvester, and not by Bailey E. Bell and William Sanders and Warren A. Taylor, and the latter have no authority to file a notice of appeal on behalf of said plaintiff, Fairview Development, Inc., an Alaska Corporation, which corporation had joined in and secured the execution and filing of said stipulation on October 9, 1953, the entry of said final judgment and decree on October 10, 1953, and the entry of the order on May 7, 1954, overruling de-

fendants' motion to set aside or rescind said stipulation and vacate said final judgment and decree from which said notice of appeal is purportedly taken.

Dated at Fairbanks, Alaska, this 10th day of May, 1954.

COLLINS AND CLASBY.

By /s/ WALTER SCZUDLO.

Affidavit of Mailing attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 10, 1954.

[Title of District Court and Cause.]

RECEIVER'S PETITION NUMBER ONE

Your petitioner, Robert E. Sheldon, respectfully represents to the court as follows:

1. That he was appointed receiver on May 7, 1954, for the property involved in the above-entitled cause, all the assets and corporate records of the plaintiff corporation, Fairview Development, Inc., and its business, together with all improvements located thereon and the fixtures, equipment, merchandise, stock and personal property located therein, and Fairview Manor Apartments, and the rents, issues and profits thereof with all the usual rights, powers and duties of receivers in equity in like cases, until further order of this court; that a

receiver's bond in the sum of \$50,000.00 was heretofore filed and approved by order of this court on May 10, 1954; and that he is in all respects the duly qualified and acting receiver herein.

2. That the principal property of the plaintiff corporation involved in the above-entitled cause is the Fairview Manor Apartments, being a 272-unit apartment project located in the Weeks Field Subdivision on Airport Road, Fairbanks, Alaska, consisting of four buildings.

3. That said Fairview Manor Apartments are subject to an FHA insured mortgage in the original principal sum of \$3,080,000.00, obtained for the purpose of financing the construction of said project; that this petitioner is informed and believes and upon such information and belief states the fact to be that the present owner and holder of said mortgage and the indebtedness secured thereby is Institutional Securities Corporation, a corporation; that the servicing agent for said mortgagee is Seattle Trust and Savings Bank, a banking corporation, with its principal place of business at Seattle, Washington; that under said mortgage there is due on the first of each and every month a total payment of \$21,690.16.

4. That at the time this petitioner was appointed receiver, and took possession of the checking accounts of the plaintiff corporation, Fairview Development, Inc., at the bank of Fairbanks and the First National Bank of Fairbanks, there was \$15,249.06 in the former and \$141.00 in the latter, which

sums were transferred to the checking account opened at the First National Bank of Fairbanks pursuant to directions of this court and its order, in the First National Bank of Fairbanks; that collection of rents and income from Fairview Manor Apartments has been made by your petitioner since his appointment and deposited in said receiver's account at the First National Bank of Fairbanks; that said collections, plus the cash found in the bank deposits hereinabove mentioned, were paid out on May 18, 1954, in payment of the following delinquent February and March bills, which were presented to the receiver for payment:

Alaska Communications System.....	\$ 5.58
Fairbanks garbage disposal.....	151.50
Potter's Store (paint and hardware supplies)	84.74
Sourdough Express (hauling coal).....	240.59
Municipal Utilities System (telephone)...	242.87
Municipal Utilities System (electricity) ..	1,341.54
Union Oil Company (gasoline and oil)....	111.78
Fairbanks Lumber (lumber for repairs) ..	72.40
G. R. Sumpter Agency (workmen's compensation insurance)	153.88
Seattle Hardware Company (supplies)....	120.12
Northern Commercial Company (repairs for stoker)	84.20
Vacuum Sales and Service (supplies—April voucher)	29.08
 Total	 \$2,638.28

In addition, all wages have been paid to employees and are current covering firemen, maintenance, janitors and cleaning women. There are five less employees employed by this petitioner than were formerly employed at said project (including the discharge of Cash Cole, Mrs. Ruth Cole and Tom Cole from the payroll). The total wages paid, net: \$2,220.38.

5. That in addition to the payments hereinbefore mentioned, the receiver paid \$16,690.16 on account of the mortgage installment due on May 1, 1954, leaving a balance due under said installment of \$5,000.00; that said installment is now delinquent as to the balance due thereunder and will be in default if payment thereof is not made on or before the end of this month.

6. That the cash on hand of the plaintiff corporation, Fairview Development, Inc., in its account at Bank of Fairbanks, was reduced on or about May 8, 1954, after the appointment of this petitioner as receiver, by payment to said bank from said account of \$7,648.36, which this petitioner has been informed was in payment of a note executed by said Fairview Development, Inc., to evidence sums borrowed from said bank earlier this year; that in addition there was a payment of \$1,325.86 to the Director of Internal Revenue from said account, and likewise other substantial payments were drawn against said account and paid therefrom between April 30, 1954, the date on which the court rendered its opinion in the above-entitled cause granting the motion for appointment of receiver and ruling on other mo-

tions, and the date on which this receiver was appointed; that as of the date hereof the receiver has cash on hand in his checking account in the sum of \$4,776.72; that wages to the employees will be due at the end of this week in the net sum of approximately \$1,500.00.

7. That there is insufficient cash on hand to pay said balance of \$5,000.00 due on said mortgage installment of May 1, 1954, hereinabove mentioned; that said payment of said balance should be made prior to the end of this month; that it will be necessary to borrow a sum not in excess of \$5,000.00 to make said payment prior to the end of this month; that it may be necessary in the future to borrow sums sufficient to insure the full payment of said monthly mortgage installment for periods not to exceed 30 days, until all of the delinquent and unpaid bills and other obligations of the plaintiff corporation have been placed on a current basis, which your petitioner believes can be accomplished in the next 60 or 90 days.

8. That the First National Bank of Fairbanks, Fairbanks, Alaska, a national banking association, has indicated to your petitioner that it will agree to loan sufficient sums to make payments of installments due under the first mortgage, for periods not to exceed 30 days, such loans to be repaid out of current rents and collections, and such indebtedness of the receiver to be evidenced by a receiver's certificate in the amount or amounts of such loan or loans from time to time, which said receiver's

certificate or certificates shall run for periods not to exceed 30 days with interest at 8% per annum, and shall be a first, prior and paramount lien upon the rents, income and collections made by this receiver, prior, superior and paramount to the right, title, interest and lien of any of the parties to this suit. A copy of the proposed receiver's certificate is hereto attached as Exhibit "A" and made a part hereof.

9. That notice of this petition has not been given by the undersigned to the parties of record due to the insufficient time available prior to the end of this month but that copies of this petition and of any order entered by this court will be served on all parties of record.

Wherefore, your petitioner prays that an order be entered in this cause, authorizing him, as receiver, to borrow a sum not to exceed \$5,000.00 for a period not to exceed 30 days, to pay the balance due under said mortgage installment due May 1, 1954, and to secure the amount necessary to cover said payment so expended by issuing and selling a receiver's certificate in an amount not to exceed \$5,000.00 and in the form, terms and figures set out in Exhibit "A" to this petition; and further authorizing your petitioner hereafter to borrow such additional sum or sums from time to time for payment of any balances due on installments, which may become delinquent under said mortgage, for periods not to exceed 30 days, to be paid out of the rents, collections, and income secured by your petitioner as receiver, and

to be secured by issuance of this receiver's certificate or certificates for the amount or amounts so borrowed from time to time, and in the sum to be set out in said Exhibit "A" to this petition.

/s/ ROBERT E. SHELDON.

EXHIBIT A

Receiver's Certificate of Indebtedness

Date:

Amount:

No.....

The undersigned, Robert E. Sheldon, receiver of Fairview Manor Apartments, located on Airport Road, Fairbanks, Alaska, and all the assets of Fairview Development, Inc., an Alaska corporation, and its business, real property, and all other property, and the rents, issues and profits thereof, appointed by order of the District Court for the District of Alaska, Fourth Judicial Division, on May 7, 1954, and now the duly qualified and acting receiver in case No. 7298, entitled: Fairview Development, Inc., et al., vs. Cash Cole, et al., not individually, but as such receiver, promises to pay to First National Bank of Fairbanks, Fairbanks, Alaska, the sum of.....

..... (\$.....), on or before..... days after the date hereof, with interest at the rate of 8% per annum, both interest and principal, being payable at the banking house of said payee, Fairbanks, Alaska.

This certificate is issued under and by virtue of

the authority granted the undersigned as receiver by order of the District Court for the District of Alaska, Fourth Division, entered on the.....
..... day of....., 1954, in said cause, No. 7298. This certificate is, by virtue of the terms of said order, a first, prior, and paramount lien on the rents, issues and profits of Fairview Manor Apartments and all other collections and receipts secured by the undersigned in said case as receiver as aforesaid and said lien is prior, superior and paramount to the right, title and interest and lien of all of the parties of interest in this cause and is prior, superior and paramount to the right, title, interest, lien and claims of all persons having or claiming to have any right, title, interest, lien or claim in and to said premises involved in the above mentioned cause or any part or portion thereof.

The holder or holders of this certificate shall be entitled to reasonable attorney's fees in the event said holder or holders hereof shall be required to institute proceedings to collect under this certificate or to foreclose the lien thereof, or shall be made a party to any proceedings involving the above mentioned premises, which fees and expenses shall be so much additional indebtedness, evidenced hereby, and shall be a lien on the rents, issues and profits of said premises and collections made by the undersigned as receiver.

In Witness Whereof, said Robert E. Sheldon, not individually, but as such receiver has hereunto

set his hand and seal this..... day of
....., A.D. 1954.

.....
Robert E. Sheldon, Not Individually, but as Re-
ceiver Aforesaid.

[Endorsed]: Filed May 27, 1954.

In the District Court for the District of Alaska,
Fourth Division

No. 7298

FAIRVIEW DEVELOPMENT, INC., et al.,
Plaintiffs,

vs.

CASH COLE, et al.,

Defendants.

ORDER ON RECEIVER'S PETITION No. 1

This matter coming on to be heard upon petition No. 1 of Robert E. Sheldon, as receiver; and it appearing and the court finding that heretofore on May 7, 1954, this court entered an order, which, among other things, appointed Robert E. Sheldon of the City of Fairbanks, as receiver for the property involved in the above-entitled cause, and all the assets and corporate records of the plaintiff corporation, Fairview Development, Inc., and its business, together with all improvements located thereon, and the fixtures, equipment merchandise, stock and personal property located therein, and

Fairview Manor Apartments, and the rents, issues, and profits thereof with all the usual rights, powers and duties of receivers in equity in like cases, until further order of this court; and it appears and the court finds that said receiver on the same day filed his written oath herein and accepted said appointment, and heretofore filed herein a receiver's bond in the penal sum of fifty thousand dollars (\$50,000.00) as security, which was heretofore approved by this court, and was conditioned upon the faithful performance of his duties as such receiver, all in accordance with the terms and provisions of said order, and said Robert E. Sheldon is now the acting and duly qualified receiver in this cause; that it appears necessary for the receiver to borrow at this time funds to pay the balance due under the delinquent mortgage installment, which became due on May 1, 1954, under the FHA insured mortgage covering the premises involved in this cause to avoid default thereunder, and the receiver does not have sufficient funds to pay the balance due under said mortgage installment at this time; and the court being otherwise fully advised in the premises.

It is now, therefore, ordered, adjudged and decreed as follows:

1. That said receiver, Robert E. Sheldon, is hereby authorized to borrow from the First National Bank of Fairbanks, Fairbanks, Alaska, a sum not exceeding \$5,000.00 to pay the balance due under said mortgage installment which became due on May 1, 1954, under the FHA insured mortgage

covering the premises involved in the above-entitled cause and known as Fairview Manor Apartments, to be secured by a receiver's certificate of indebtedness in that amount not exceeding \$5,000.00 and payable on or before 30 days after the date thereof and to be in the form substantially as Exhibit "A" attached to said receiver's petition No. 1.

2. That said receiver is hereby further authorized to borrow such additional sums hereafter from time to time as he may deem necessary to pay any balance or balances due under subsequent installments which may become delinquent under said FHA insured mortgage for periods not to exceed 30 days and to be paid out of the rents and receipts collected by said receiver, and to be secured by receiver's certificates of indebtedness in the form substantially of exhibit "A" attached to said receiver's petition No. 1, and to be paid in not exceeding 30 days after the date of execution of such certificate or certificates.

Entered and done this 27th day of May, 1954.

/s/ HARRY E. PRATT,

United States District Judge.

[Endorsed]: Filed and entered May 27, 1954.

[Title of District Court and Cause.]

RECEIVER'S MONTHLY REPORT AND
ACCOUNT FOR MAY, 1954

The undersigned, Robert E. Sheldon, respectfully

represents and reports to the court as follows:

1. That he was appointed receiver on May 7, 1954, for the property involved in the above-entitled cause, all the assets and corporate records of the plaintiff corporation, Fairview Development, Inc., and its business, together with all improvements located thereon and the fixtures, equipment, merchandise, stock and personal property located therein, and Fairview Manor Apartments, and the rents, issues and profits thereof with all the usual rights, powers and duties of receivers in equity in like cases, until further order of this court; that a receiver's bond in the sum of \$50,000.00 was heretofore filed and approved by order of this court on May 10, 1954; and that he is in all respects the duly qualified and acting receiver herein.
2. That the principal property of the plaintiff corporation involved in the above entitled cause is the Fairview Manor Apartments, being a 272-unit apartment project located in the Weeks Field Subdivision on Airport Road, Fairbanks, Alaska, consisting of four buildings.
3. That an order was entered in the above cause providing, among other things, that this receiver make a written monthly accounting of all his receipts and disbursements for each calendar month on or before the 10th day of the month succeeding the period covered by each report, the first report to be made on or before June 10, 1954; that attached hereto marked as exhibit "A," and by this reference made a part hereof the same as if herein fully

set out, is an account of all of the receipts and disbursements secured and made by this receiver from the time of his appointment to and including May 31, 1954; and that this report and accounting is submitted to this court pursuant to said order.

4. That collection of rents and income from Fairview Manor Apartments and all other collections have been made by this receiver since his appointment and deposited by this receiver in a banking account opened in his name as receiver, with the First National Bank of Fairbanks, Alaska, that all expenditures for any purpose made by this receiver have been done only by check against said checking account, which checks have been countersigned by Ray Kohler, public accountant, all in accordance with the provisions of said order dated May 10, 1954.

5. That said Ray Kohler has maintained the books of account of said plaintiff corporation and of this receiver and prepared the attached account of receipts and disbursements; that said Ray Kohler has performed said services as a public accountant and used the facilities of his office all on a time basis; that his charges for said services are \$7.50 per hour for those performed by himself, and \$5.00 per hour for those services performed by his assistants, which charges include the use of the facilities of his office; that this receiver is informed and believes, and upon such information and belief states the

fact to be that said charges are the usual and customary charges for services of this nature in the Fairbanks area, and are fair and reasonable.

6. That at the time of the appointment of this receiver there were two bank accounts maintained for the plaintiff corporation, one at the Bank of Fairbanks and the other at the First National Bank of Fairbanks; that the balance in the sum of \$15,249.06 in the first account above mentioned and \$141.00 in the second account above mentioned, have been transferred by this receiver to his checking account.

7. That notice was served on both banks prior to the opening of business on May 8, 1954, that no checks theretofore drawn against said accounts should be honored without the approval of this receiver; that an investigation of this receiver disclosed that the following, among other checks, had been drawn by the defendant Cash Cole, or by and through his authorized agent, against said account of the plaintiff corporation at the Bank of Fairbanks:

Check No. 409.

Date of Check: April 30, 1954.

Payee: Cash Cole

Reported Purpose: Purchase of furniture in
Apartment 3-B-7.

Amount: \$862.50.

Check No. 410.

Date of Check: April 30, 1954.

Payee: W. A. Taylor.

Reported Purpose: Attorney's fees, 1954.

Amount: \$8,000.00.

Check No. 411.

Date of Check: April 30, 1954.

Payee: Bank of Fairbanks.

Reported Purpose: Payment of Note.

Amount: \$7,648.33.

Check No. 420.

Date of Check: May 6, 1954.

Payee: Warren A. Taylor.

Reported Purpose: Court costs.

Amount: \$1,500.00.

That of the above-described checks, the one bearing No. 411, payable to the Bank of Fairbanks, has been honored by said bank without the specific authority of this receiver; that the others have not been paid as far as this receiver is informed; that all other checks drawn on said account prior to May 7, 1954, and during the period between April 30, 1954, when the opinion of this court was ren-

dered, directing, among other things, the appointment of a receiver herein, and May 7, 1954, when this receiver was appointed, have been honored and paid.

8. That the monthly installment of principal, accrued interest, and other payments due under the FHA insured mortgage covering the Fairview Manor Apartments project due on May 1, 1954, in the sum of \$21,690.16 was delinquent at the time of the appointment of this receiver as more fully stated in Receiver's Petition No. 1, filed in the above-entitled cause on May 27, 1954; that it was necessary to borrow \$5,000.00 from the First National Bank of Fairbanks, pursuant to authority of this court granted in its order entered herein on May 27, 1954, on said receiver's petition; that the total installment due on May 1, 1954, has been paid in full; that a receiver's certificate of indebtedness for said loan of \$5,000.00 was executed and delivered to the First National Bank of Fairbanks in substantially the form marked as Exhibit "A" and attached to said Receiver's Petition No. 1.

9. That Mr. V. P. Reimer, director of the Federal Housing Administration at Juneau, Alaska, has requested that a complete audit report showing the current financial condition of the project be secured as soon as possible, which report should be prepared by a certified public accountant and should contain a balance sheet, current profit and loss statement, and a statement of surplus; that a similar report has been requested by the plaintiffs; that such audit is now being prepared up to ap-

proximately the date of the apopintment of this receiver by the office of Pritchard & Lofquist, certified public accountants, Seattle, Washington, covering the period from the last day on which said accountants prepared their audit of the books of said plaintiff corporation up to and including the appointment of this receiver; that copies of said audit will be submitted to this court when prepared with the next report and accounting of this receiver.

10. That the employment of Mr. and Mrs. Cash Cole with the corporation and Fairview Manor Apartments was terminated as of the close of business on May 7, 1954, and settlement and payment was made of all sums due them for salaries or wages; that said Mr. and Mrs. Cash Cole are occupying a double apartment; said double apartment consisting of efficiency apartment No. 2-A-7, calling for a rental of \$125.00 per month, unfurnished, and apartment No. 2-A-8, being a two-bedroom apartment calling for a monthly rental of \$165.00 per month, unfurnished; that said apartments have been furnished by furniture and furnishings owned by the plaintiff corporation, and that this receiver is informed and believes and upon such information and belief states the fact to be that the monthly rental value of said furniture and furnishings is at least \$50.00; that said defendant, Cash Cole and his wife, have made no payment for the rental of said double apartments and furniture and furnishings and that the same is due from them from the date of the appointment of this receiver.

11. That the employment of Tom Cole was termi-

nated as of May 15, 1954, and that all sums due him for wages and salary have been settled and paid; that said Tom Cole and his wife occupy a two-bedroom apartment, being 3-E-7, for which the rental is \$165.00 per month; that no payment has been made by said Tom Cole for said rental and that the same remains due and unpaid and owing to this receiver from May 15, 1954, to the date hereof.

12. That at the time of the appointment of this receiver there were approximately 30 vacant apartments in the Fairview Manor; that these vacancies had been reduced down to 19 on May 31, 1954; that included in said 19 vacancies are 3 apartments rented by Moorland Contractors, Inc., of Portland, Oregon, and an apartment formerly reserved for the defendant, Everett Nowell; that this receiver is informed and believes and upon such information and belief states the fact to be that the defendant Cash Cole is or was an officer, director and stockholder of said Moorland Contractors, Inc.; that there is due from said Moorland Contractors, Inc., the sum of \$1,050.00 on each of said three apartments, which sum includes the rental for the month of June; that this receiver is attempting to collect said delinquent accounts from said Moorland Contractors, Inc., and to secure release of possession of said apartments.

13. That it has been necessary to sign rental lease agreements with new tenants secured by this receiver; that the terms and conditions of said rental lease agreement have been substantially the

same as those contained in agreements executed by the plaintiff corporation prior to the appointment of this receiver, except that the lease agreements signed by this receiver have been specifically made subject to the orders of this court and subject to termination by discharge of this receiver in said proceedings.

14. That this receiver has been occupied full time since his appointment in matters pertaining to said receivership and management at Fairview Manor Apartments.

Wherefore, this receiver prays as follows:

- (a) That the above and foregoing report and monthly account of this receiver be approved.
- (b) That the retention of the certified public accountants, Pritchard & Lofquist, to make an audit be approved, and likewise payment for said audit.
- (c) That payment of charges made by Ray Kohler, public accountant, appointed by this court pursuant to order entered May 10, 1954, which charges are hereinabove set out, on a time basis be approved and the receiver permitted to make payment out of the receipts secured by him.
- (d) That said defendant, Cash Cole and his wife, Ruth Cole, be directed to pay to this receiver rental in the sum of \$340.00 per month beginning May 7, 1954, for the double apartment occupied by them and the furniture and furnishings therein, in advance, and in addition, to make a deposit of one month's rent in advance as security in accordance with the general procedures followed at said

project; and that upon failure to make such payment and deposit within 15 days from the date of the order of the court, that the clerk of this court be directed to issue a writ of assistance directing the United States Marshal for the Fourth Judicial Division to remove said defendant and his wife and any person or persons occupying said apartments No. 2-A-7 and No. 2-A-8, and return possession of said apartments and the furniture and furnishings therein to this receiver.

(e) That Tom Cole be directed to pay rent in the sum of \$165.00 monthly, in advance, beginning May 15, 1954, for the apartment occupied by him No. 3-E-7, and that if he fails to make such payment on or before 15 days from the date of the order of this court that the clerk of this court be directed to issue a writ of assistance directed to the United States Marshal, Fourth Judicial Division, directing said marshal to remove said Tom Cole and his wife and all other person or persons occupying said apartment No. 3-E-7 and their property therefrom, and to return possession of said apartment to this receiver.

(f) That the execution of rental agreements by this receiver in the form and with the terms hereinabove mentioned be approved.

(g) That the court allow receiver's fees for the services of the undersigned as receiver herein.

Dated at Fairbanks, Alaska, this 10th day of June, 1954.

/s/ ROBERT E. SHELDON.

United States of America,
Territory of Alaska—ss.

Robert E. Sheldon, being first duly sworn, on oath, deposes and says: That he is the receiver in the above-entitled cause; that he has read the above and foregoing monthly receiver's report and account; knows the contents thereof and that the same are true in substance and in fact, except such matters as are alleged upon information and belief, and as to such matters he has made diligent search and inquiry and believes the same to be true.

/s/ ROBERT E. SHELDON.

Subscribed and sworn to before me this 10th day of June, 1954.

[Seal] /s/ MYRTLE L. BOWERS,
 Notary Public in and for the
 Territory of Alaska.

My commission expires: June 10, 1958.

EXHIBIT A

Fairview Development Co., Inc.
Fairbanks, Alaska

Robert E. Sheldon, Receiver

Statement of Source and Application of Funds
Period May 8, 1954, Through May 31, 1954

Source of Funds:

On Hand May 8, 1954—

Office Fund	\$ 168.87
Deposit in Transit	82.50
Bank of Fairbanks	15,249.06
First National Bank	144.21
Bank of Commerce	100.00

Total Funds on Hand	\$15,744.64
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Source of Funds—(Continued)

Income from Operations—

Apartment and Garage Rentals ..	\$11,935.21
Security and Key Deposits	1,740.70
Laundry Proceeds	145.80
Vacuum Cleaner Rentals	6.00
Cleaning Apartments	10.50
Miscellaneous	2.50
	<hr/>
Total Funds from Operations ..	\$13,840.71

Other Additions to Funds—

Loan, First National Bank	\$ 5,000.00
Note Payment, Victor Olson	200.00
Deposit Returned	18.00
Reimbursement of Office Fund	131.13
	<hr/>
Total Other Additions	\$ 5,349.13
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Total Funds from All Sources	\$34,934.48
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Application of Funds:

Funds Expended—

Payments of Trade Accounts	
Payable	\$ 2,638.28
Wages	2,289.76
Payment to Federal National	
Mtg. Ass'n.	21,690.16
Refunds of Tenants' Deposits	
and Rentals	1,138.30
Refunds on Over-Collection of	
School Tax	20.00
Bank Charges—Exchange	30.68
Painting Apartments — C. W.	
Lloyd, Contractor	376.62
Repairs to Boilers—Paul Baker,	
Contractor	160.00
Reimburse Office Fund for Ex-	
penses—Paid by Cash Prior to	
May 8, 1954	131.13
	<hr/>
Total Funds Expended	\$28,474.93

Application of Funds—(Continued)

Funds on Hand May 31, 1954—

Office Fund	\$ 300.00
First National Bank	6,059.55
Bank of Commerce	100.00
Total Funds on Hand	6,459.55
Total Funds Applied	\$34,934.48

Certified Correct.

RAY KOHLER,
Public Accountant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 10, 1954.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 7298 Civil

FAIRVIEW DEVELOPMENT, INC., an Alaska
Corporation; NELSE MORTENSEN, CLIFF
MORTENSEN and FRANK V. HENDER-
SON, Individually and as Directors and Stock-
holders of Fairview Development, Inc., and for
and on Behalf of All Other Stockholders of
Fairview Development, Inc.,

Plaintiffs,

vs.

CASH COLE, Individually and as an Officer and
Director of Bayview Realty, Inc., an Alaska
Corporation, and Fairview Development, Inc.;
EVERETT NOWELL, Individually and as an

Officer and Director of Bayview Realty, Inc.; and Fairview Development, Inc.; BAYVIEW REALTY, INC., an Alaska Corporation; FIRST NATIONAL BANK OF FAIRBANKS, a Corporation; and BANK OF FAIRBANKS, a Corporation,

Defendants.

Appearances:

EARLE W. ZINN and JOSEPH DIAMOND, of LYCETTE, DIAMOND & SYLVESTER, WALTER SCZUDLO, of COLLINS & CLASBY,

Attorneys for plaintiffs: Fairview Development, Inc., an Alaska corporation; Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, individually and as Directors and Stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., and for defendants First National Bank of Fairbanks, a corporation, and Bank of Fairbanks, a corporation.

NICHOLAS JAUREGUY, of CAKE, JAUREGUY & HARDY,

JOHN HEDRICK, of MORRISSEY, HEDRICK, ROBERTS & DUNHAM,

Attorneys for all other defendants.

Before: Hon. Harry E. Pratt, District Judge.

October 5, 1953

Be it remembered, that the trial of Cause No. 7298 was begun at 10:00 a.m., October 5, 1953, plaintiffs and defendants represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Clerk: Court is now in session.

The Court: This was the time set for trial of Cause No. 7298, Fairview Development, Incorporated, against Cash Cole, et al.

Are the parties ready?

Mr. Sczudlo: The plaintiff is ready.

If the Court please, at this time I would like to move for the entry of the appearance, on behalf of the plaintiffs, of Mr. Josef Diamond of the Washington State Bar and also Mr. Earle W. Zinn of the Washington State Bar, for the purpose of trying this case with local counsel.

The Court: Very well. Request granted.

The defendants are ready?

Mr. Jaureguy: Yes, your Honor, the defendants are ready.

The Court: Do you wish to make opening statements? [3*]

Mr. Diamond: Yes, the plaintiff would like to make opening statements, if your Honor please.

I don't know whether or not the Court has had an opportunity of reading the pleadings, but I would like to call the Court's attention first to the parties. There are quite a number of parties and it

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

might be confusing as to the various names and the people who will be testifying and their position in connection with this suit.

This lawsuit is brought by Fairview Development, Incorporated, an Alaska Corporation, and by Nelse Mortensen, Cliff Mortensen, and Frank Henderson, individually, and as directors and stockholders of the plaintiff corporation for and on their own behalf and on behalf of all other stockholders in the plaintiff corporation, Fairview Development Corporation.

There are present here in the courtroom and available throughout the trial, and I believe they all will testify, Mr. Cliff Mortensen, one of the plaintiffs and stockholder of the corporation; Frank Henderson, another stockholder and director of the corporation, but Mr. Nelse Mortensen, however, is ill and will not be present in the courtroom. The suit is brought against Cash Cole, who is here; Everett Nowell, who is here or who will also be here, individually and as officers and directors of an Alaska corporation known [4] as the Bayview Realty Corporation, and it also names as defendants the two local banks, but only for the reason that the banks have in their custody and possession money belonging to the Fairview Development Corporation, the plaintiff, and because of the relief requested by the plaintiffs. If the relief is granted we thought it would be advisable to have the banks where the funds of the corporation would be available subject to the order of the Court.

Actually, there is no real controversy between

the plaintiffs and the defendant banks except that the defendant banks do have possession in and custody over funds belonging to the plaintiff corporation.

Now, the suit requests that the defendants, Cash Cole, Everett Nowell, and the Bayview Realty Corporation be required to render a full and complete accounting of all funds received by them, or any of them, belonging to and the property of Fairview Development Corporation, together with a full accounting of all disbursements made by them, or any of them, from the funds of the plaintiff corporation or purportedly on behalf of the plaintiff corporation; that the defendants be required to account for the reasonable rental value of apartments belonging to the plaintiff corporation [5] and occupied wrongfully by the defendants; and upon said accounting that the plaintiff corporation have a judgment against the defendants for such amounts as will be found due, together with interest thereon.

The complaint also asks that the defendants Cash Cole, Everett Nowell, and the Bayview Realty Company, and each of them, be removed and disassociated from the management and control of the property and assets of the plaintiff corporation and that they take no further part in the affairs of the corporation by reason of their acts and conduct that will be shown by the evidence in this case.

The plaintiff corporation, Fairview, as it was finally organized, is divided really into a corporation having 900 shares of stock. There are actually

1,000 shares of stock. There are 900 shares of common stock with voting rights. There are 100 shares of stock which belong to the F.H.A., which is preferred stock having no voting right in the corporation except under certain peculiar circumstances which are not material here in this lawsuit. The 900 shares of stock are divided: 150 shares for Cliff Mortensen, 150 shares for Frank Henderson, and 150 shares for Nelse Mortensen, making 450 shares, or exactly one-half of the control of the corporation in the Mortensen-Henderson people, [6] the plaintiffs in this lawsuit.

For brevity's sake, we will refer throughout the trial, I believe, to the Mortensen interests.

The other 450 shares of stock are owned by the Bayview Realty Corporation. I point out that the evidence will show that they are owned not by the individuals Everett Nowell and Cash Cole, but are owned by the defendant Bayview Realty Corporation.

Now, the Fairview Corporation was organized for the purpose of owning a large apartment house development here in the city of Fairbanks. Bayview Realty Company had the opportunity, through some work their officers had performed, in obtaining a 75-year lease on the property on which Fairview Manor is now constructed and exists. They approached the Mortensen interests with a view to having them go into an organization and forming a corporation for the construction of this F.H.A. project, and such an arrangement was made.

The record and the evidence will show that

when they first approached them, the Bayview Realty had no money or corporation and put no money into the operation whatever. They did put forth their efforts in obtaining the lease to the property on which the project was to be built. In consideration of that, the Fairview Development Corporation was to be formed, with the [7] Mortensen interests having two-thirds of the ownership and control of the Fairview Manor, the Fairview Corporation and the Bayview Corporation having one-third.

The evidence will show, though, that from the very start the defendants, and particularly the defendant Cash Cole, had the deliberate intent and purpose of taking over this project, cheating and depriving the Mortensen interests of their interest in this property, to get control of the Fairview project and the Fairview Manor. And from the very beginning the evidence will show that in order to beat the weather and start the construction, that pursuant to preliminary negotiations with Fairview having two-thirds interest and Cash Cole and the Bayview group having one-third, construction was started prior to all of the paper work being completed in the project. So that when it became time to complete the paper work the project had to go forward insofar as the Mortensen interests were concerned because they were committed in large sums of money, and by Mr. Cole particularly in the position of being able to obtain, instead of his one-third interest, a fifty per cent ownership in the Fairview Corporation, which he extracted and re-

ceived, and the stock, as I stated, was issued: 450 shares to the Bayview Corporation and 450 to the Mortensen interests, being equally divided. [8]

Along with their original arrangement it was anticipated that the construction of the apartment houses could be done for a sum of money less than the amount of the Government mortgage. The Government mortgage was to be, and was in fact, \$3,080,000. It was anticipated that the apartment houses could be built in accordance with the Government-approved plans and specifications for a sum less than that by the Mortensen people, who the evidence will show are builders and contractors, for many years in the construction business.

It was agreed along with the same arrangement on the ownership that the Bayview Realty Corporation would be entitled to one-third of the net profits on the same basis that they were to have one-third of the ownership. That was never changed, so that the Bayview Corporation is entitled to under the documents as finally completed one-third of any net profit in the construction of the Fairview Manor —any net profit, difference between the actual cost of construction and the \$3,080,000 loan by the Government under the F.H.A. through the National Bank of Commerce in Seattle.

The apartment houses, so we get some idea of the size of them, the evidence will show that there are 272 units, four fairly substantial buildings; that when [9] the documents were put together the amendment or the articles of incorporation as originally prepared by Mr. Cash Cole, though not a lawyer, had to be amended I think on three oc-

casions in order to comply with the law and to comply with the regulations and requirements of the Federal Housing Administration, who were going to loan the money.

The articles of incorporation provide for not less than three nor more than five directors, without naming them, in the articles as finally amended and filed. The minutes were drawn up and four directors were named and agreed upon, the four directors of the Fairview Corporation being Cliff Mortensen, Frank Henderson, Cash Cole, and Everett Nowell. So the directorship was evenly divided.

That was concluded on June 15th of 1950. The next day, on June 16th, the parties entered into a voting agreement, and pursuant to that voting agreement they recited that there were three directors, though the minutes of the corporation, the only ones we were able to locate, show that there are four, recited that there are three, Everett Nowell, Cash Cole on the one side, and Cliff Mortensen on the other side, and went on to provide that each side would have one vote. That is, [10] when they speak of sides they were talking about Cash Cole and Everett Nowell as being one side, and the Mortensen interests being the other, Cash Cole and Everett Nowell being at least the majority stockholders in Bayview Realty Company, this other corporation in which the Mortensen interests had no interest on the subject. The Bayview Realty, I think that was their own, although I think there were others interested in it.

This voting agreement provided that no action

by the board of directors or plaintiff corporation, Fairview, would be binding or would be valid unless it was approved and agreed upon by each side, each side having one vote, so that it was kept equal right down the middle from the time that it was changed from the Mortensen interests having two-thirds, which is the original arrangement. It was changed and fixed and intended that the Bayview or Cash Cole group would have one vote and the Mortensens would have one vote, exactly fifty per cent of the stock ownership and exactly fifty per cent in the directorship.

The construction went ahead not quite as fast as everybody hoped, but it did go ahead, and the evidence will show that sometime in April of 1951, construction having started sometime in the middle of the summer, I [11] believe, or prior to that in 1950, to the following year, in April of 1951 it began to appear that some of the apartments would be ready and available for occupancy and arrangements should be made by the Fairview Corporation to rent them out.

I might say before we get to that, the construction of the apartments then was done by the Mortensen interests forming a corporation, a corporation they called Nelse Mortensen-Alaska Corporation, a corporation—I think it was a Washington corporation—be authorized to do business here. A contract was given by the Fairview Corporation, the plaintiff here, to the Nelse Mortensen-Alaska Corporation to build the apartments in accordance with those plans and specifications for the amount

of the mortgage money, \$3,080,000. The contract provided that all of the loaned money would go to the construction company for the construction of the apartments; that during the construction the construction company would pay all of the costs and expenses in connection with the construction; in other words, during construction there were items of interest, insurance, taxes, and they were to be paid by the construction company because the Fairview Development Corporation, the ownership company, in fact had nothing but the lease to the property, and all of the construction money coming from the Federal [12] Housing Administration went to the construction company. The construction corporation was owned entirely by the Mortensen interests. Like the Bayview Corporation owned entirely by the Cash Cole interests, the construction company was owned entirely by the Mortensen interests. There was an agreement, however, that the construction company would pay over one-third of any profit to the Bayview Realty Company, which was the one-third of the construction profit, if any. The construction company, while Cash Cole and Everett Nowell had no monetary interest they each were made vice presidents of that corporation. They had no interest in that corporation but they were and they are interested in the profit that that corporation may make, and they would be and are entitled to an accounting for the profit in the construction of the apartments. I speak of that in the future, while it is not presently in this lawsuit, the completion of the wind-up of the construction

company by reason of things never mentioned, the actual profit has not yet been determined, but that is not a subject matter in this litigation here.

When in April it was determined that the apartments were getting ready for completion, Mr. Everett Nowell determined that there should be a meeting and some [13] arrangements made for operating Fairview Manor and these apartments. It makes it necessary for me to outline briefly the previous arrangement. The agreement was that after the completion of the apartments, Bayview Realty Company would take over the management of Fairview Manor for the Fairview Development Corporation. In other words, Bayview Corporation, that is, Cole and Everett Nowell and whoever else might be interested in it would manage the apartment house for the ownership company. In the agreement for that it did not go any further than stating that they would have the management. The evidence will show that how much they were to be paid for the management was a subject which was in considerable dispute and it could not be determined. So that in the agreement, one or two that were drawn saying that Bayview should have the management, it merely went on and provided that the terms of compensation would be such as the board of directors of the Fairview Development Corporation should determine, but did not fix it. So when it became apparent that the apartments were going to be available piecemeal instead of all at one time, there was a demand for use and occupancy, rentals could be obtained, Everett Nowell

requesting that a meeting of the directors and stockholders of Fairview Development, the ownership [14] corporation, to make such arrangements as would be necessary.

Now I think we had better point out what the evidence will show insofar as the officers of Fairview Development and talk about the rest of it being evenly divided.

The president of Fairview Development Corporation was Everett Nowell. The secretary-treasurer of Fairview Development Company was Cash Cole, and an assistant secretary—I don't think it is too important, but an assistant secretary was elected, first Mr. Peret. Subsequently he resigned, almost the same time, and A. R. Mortensen, not directly related to the Mortensens, was an assistant secretary elected.

Cliff Mortensen was a vice-president of the corporation. However, other resolutions provided that Cliff Mortensen should also be president, so that there were two presidents of Fairview Development Company. I don't know about the legality of it, but it existed. Apparently it was a practical approach to the problem because Cliff Mortensen was in Seattle taking care of the financing and they needed the president's and secretary's or assistant secretary's signature, so he was designated the president to handle whatever had to be [15] handled in Seattle, and Everett Nowell previously had been made president. Anyway, Nowell determined that a meeting should be called of the stockholders and directors. The evidence will show that Everett

Nowell wrote a letter to Cliff Mortensen on May 25, 1951.

(Mr. Diamond read the letter of May 25, 1951, referred to.)

When he refers to "Ken" he is talking about Ken Kato. I think the evidence will also show that Ken Kato has an interest in the Bayview Realty Company along with Cash Cole and Everett Nowell. And when he refers to "Joe" in the letter, he is referring to me, Joe Diamond.

Pursuant to that letter, a meeting was arranged of the stockholders and directors of the Fairview Development. Notices were sent out signed by Mr. Nowell as president, and all of the stockholders and directors were present in my offices as attorneys for Fairview Development on June 11 and 12, 1951, which is prior to any of the apartments being rented or becoming available for rental for the purpose as requested by the president—one of the presidents—that arrangements be made to rent the apartments which were in demand. Present at the meeting were all the stockholders and all [16] the directors, Nelse Mortensen, Cliff Mortensen, Frank Henderson, and Bayview Realty Corporation. Also present were Everett Nowell, Cash Cole, and Joseph Diamond. Frank Henderson was present on June 11th, meetings being held June 11 and June 12th.

Then it went on to provide that in view of the fact that a regular annual meeting of the stockholders and directors was not held, and the evidence will show that none were ever held as provided for,

the following directors were unanimously elected: Everett Nowell, Cash Cole, Cliff Mortensen. These minutes would change the number of directors, in that previously, in June of 1950, there were four. These minutes changed it to three: Everett Nowell, Cash Cole, and Cliff Mortensen, "with the understanding and agreement that the directors shall continue in office with authority to act, etc.," in other words, the parties re-elected three of them as directors but provided that the voting agreement should remain, giving one vote to each side, keeping it strictly neutral, each having equal say in the directorship of the apartment houses, and then, because there was dispute as to the officers, there being two presidents, they re-elected and elected the following officers: Everett Nowell as president, Cliff Mortensen as vice president, Cash Cole [17] as secretary-treasurer, and A. R. Mortensen as assistant secretary-treasurer.

Then, at the same time the motion was made and unanimously carried, after these others were approving checks which had previously been signed and delivered on behalf of Fairview Development Company. There was some dispute as to who was president, and there were two presidents, some question raised by the banks as to signatures on checks, so the motion was made and passed approving all signatures on all checks in the past, because no one knew anything wrong about any of them.

Everett Nowell, as president, had signed some checks properly, but there was some question as to

whether he had authority to sign them. There wasn't anything wrong with him signing checks, that is, no running off with any money, but there was some question as to whether he had actual legal authority to sign. Then some other matters were taken up with respect to claims against the corporation for extras that were being made by Mr. Rushlight and some possible claims by the construction company, that is, the Nelse Mortensen-Alaska Company, in connection with some extras, and note was made of those matters.

The minutes went on about arrangements [18] made for leasing apartments, Bayview Development, Inc., having the right to manage them, leased in the name of the Fairview Development, but Bayview Realty acting as agent, etc. In other words everything was to be done in the name of Fairview. Bayview would approve all charges before they were actually paid by Bayview, but they would actually be paid by Fairview Development.

The evidence will show by Everett Nowell, as the certified public accountant that Herbert Lofquist, or under his direction, someone acting for him in Alaska, did keep the records and accounts of Fairview Development and have the authority to deposit income to the corporation in the corporate account and draw checks on the corporation in payment of the obligations, etc.

The evidence will show that when Mr. Nowell wrote down asking for this meeting as president or wanting arrangements made, he wanted the funds handled and controlled not by Bayview

Realty, in which he had some interest, but by an accountant or someone who was to be bonded, and not by Cash Cole, and this arrangement was set up, the evidence will show, for Everett Lofquist, a certified public accountant, to be bonded and to handle the money but that Bayview Realty would have the supervision as far as management but would not handle the funds in connection with the operation, and no one else, neither the Mortensens [19] nor the Cash Cole interests, none of them. It provided that all expenses should be paid by check as due, etc. That motion provided for prorating insurance costs and taxes and interest, and the reason for that was that during the construction the construction company was required to pay the taxes and the interest and the insurance. They had all of the funds that came from the F.H.A but now they were turning over apartments piecemeal. It was not as contemplated, all at one time, but piecemeal. They were turning over apartments to the ownership company. The ownership company, Fairview, was going to rent these apartments, would get the rental income from the apartments and pro rata would pay their own insurance and taxes on their apartments as they took them over, and that is the reason for that provision.

Then the minutes went on: moved, seconded and unanimously agreed that as the corporation took over any apartments the corporation would execute a proper release to the construction company. In other words, as the apartments were turned over piecemeal to the ownership corporation, the

evidence will show that they were to accept them so that subsequent damage by tenants or anyone else would not be charged to the construction company, but if there were any defects or [20] anything wrong that did not meet the F.H.A. approval the construction company would still be responsible. The construction company had agreed to construct in accordance with F.H.A. requirements.

Then there was a motion as to payment for management. The evidence will show that Cash Cole and Everett Nowell were, as vice-presidents in the construction company, receiving compensation from the construction company, which they were in any event to receive one-third of the profit, and they were already receiving some income in the way of salaries or compensation from the construction company. It was contemplated as the apartments were being turned over piecemeal, until they had enough turned over and enough coming in, that there would not be any management expense because there wouldn't be any money to pay for it with and there wouldn't have been earned sufficient to justify it. So that was passed.

Then it goes on to the determination of proper management directors of the corporation. No agreement could be reached. It would have been a fine time to arrive at proper compensation, but no agreement could be reached, so it was left to the directors to determine, which was evenly divided, at some future time. [21]

While they were not to get any management fees, it was recognized they were going to come

up for Bayview Realty and rent the apartments and incur expenses and those expenses would be taken care of by the ownership corporation.

Then, one other item that is called attention to in these minutes. The evidence will show, while they may be a peculiar place for that kind of a provision, as indicated by Everett Nowell in his letter, Cash Cole was controlling Bayview and Everett Nowell was afraid of that situation, so he insisted this didn't help the Mortensen interests one bit but Everett Nowell insisted that in the management by Bayview Everett Nowell would have an equal say with Cash Cole, the same way that the management or the directors of Fairview was divided right down the middle. This provided, as far as Bayview, as between Cash Cole and Everett Nowell, they would each have equal say.

After that meeting, after those minutes were drawn up and signed by the Mortensen interests and copy sent to Mr. Lofquist, certified public accountant, and requesting that he incorporate the minutes into the records and organization and that he take steps to open the bank accounts and he was to sign checks, the [22] evidence will show Mr. Lofquist went ahead and took such steps, got resolutions from the bank, but ran into a stumbling block. Everett Nowell and Cash Cole refused to sign the minutes. The minutes, however, were signed by the others. The evidence will show that the minutes are exactly what transpired at the meeting and what was unanimously agreed to by all parties, and Mr. Lofquist was notified that they

were the minutes of the corporation. In any event, it didn't have to be signed but were merely evidence of what transpired at the meeting.

Now, pursuant to that meeting Cash Cole and Everett Nowell, the evidence will show, came north and took over the renting of the apartments in the Fairview Manor.

Now, the evidence will also show that about that time claims were being made by a subcontractor, A. J. Rushlight and Company, in connection with plumbing. Rushlight Company had the subcontract for the plumbing from Nelse Mortensen-Alaska. The subcontract was for \$449,000.

Your Honor is probably familiar, at least it is a matter of record in this jurisdiction that there is a lien foreclosure action by the Rushlight Company against Fairview Development and the city because [23] it is a leasehold, and others including the Mortensens to foreclose a mechanics' lien against Fairview for work performed by Rushlight. That foreclosure action is for, I believe, \$356,000, which the evidence will show represents about \$326,000 over and above the original contract price of \$449,000.

Now, the evidence will show that Mr. Cash Cole, in his endeavor to grab and take over this project and completely keep it not only from the Mortensen interests but also from Everett Nowell, endeavored to encourage that foreclosure action against the Fairview Development Company and aided and abetted the Rushlight interests in pushing that foreclosure action against the very com-

pany he owned a substantial interest in, the Fairview Development; that he has since aided by furnishing information to attorneys representing the Rushlight Company and by other actions which will be disclosed here in the courtroom in endeavoring to cause dissention and difficulty, and the witness will say in his own words so that he could end up owning the Fairview Development Company without any partners.

Then at the same time Mr. Cash Cole proceeded to ignore this meeting, the minutes of which he would [24] not sign, and took over and started to run Fairview Development as though it was his own property, paying very little if any heed even to Everett Nowell except when he felt he needed the support of Everett Nowell. Then he would join with him on some basis.

The Mortensen interests did not learn until some time later, the exact date I have forgotten, that Cash Cole had retroactively started paying himself \$1,000 a month for his services in managing the Fairview Development. At the same time he started paying Everett Nowell \$1,000 a month for managing Fairview Manor. At the same time he took an apartment for himself free, and at the same time he gave an apartment to Everett Nowell free, and the evidence will show Everett Nowell had at the expense of Fairview Development built a bar in his apartment for some four or five hundred dollars for his additional use and benefit.

The evidence will show that Everett Nowell, as a factual matter spent very little time—you can

count it up in days over the past two years that he has been drawing \$1,000 a month up here at any time. And then the evidence will show he was here working for Alaska Freight Lines and did not, except for maybe a matter of a few days, at any time during the two years perform any services for Fairview Development, for which he has [25] been receiving \$1,000 a month for I think it was dated back to July of 1951, ran through November of 1952. The month of December, 1952, Everett Nowell was not paid \$1,000 a month.

The evidence will show, first, Mr. Cash Cole says, "Times were tough and we took Everett Nowell off the payroll. We didn't need him any more." The evidence will show that didn't sit too well with Everett Nowell and in order to change that situation the evidence will show that Everett Nowell is now to be paid retroactively his \$1,000 a month again.

There is testimony under oath both ways; first, that he is off the payroll and he is not to receive any pay, and then that he has always been entitled to \$1,000 down to the present time and at the present time. The evidence will also show that the apartments over at Fairview Manor are rented unfurnished; however, Everett Nowell's apartment is furnished and the expense of the furniture, \$3,000-odd charged to Fairview Manor. No meeting of any description at any time with regard to any of these matters. Cash Cole and Everett Nowell doing what they pleased with the corporation money. The evidence will show that Cash Cole's

apartment is furnished with furniture to the tune of \$4,200 or [26] \$4,300, paid for by Fairview money. What kind of furniture? The evidence will show that he bought silverware, linens, dishes, paid for by Fairview. Compensation, \$1,000 a month, apartment, furniture, free, two pick-up trucks for their use, personal as well as business, all at the expense of Fairview. Directors' meetings approval, none.

Now, the evidence will also show, and I believe without any notice to Mr. Nowell, Mr. Cole was not satisfied with the unfurnished apartment so he cut a hole in the back of the one he had and he now has two free.

What else will the evidence show? That Mr. Cole in December, right after Christmas 1951, left Fairbanks, hired another manager, paid him first \$650 and then \$800 a month plus an apartment; left Fairbanks in December, right after Christmas in 1951 and did not return until May 27, practically June, five months when he was away. During that five-month period Mr. Cole took \$1,000 a month for each and every month as manager. Mr. Everett Nowell, who during that five-month period spent not over a week, or as a matter of fact any of the time, took \$1,000 a month for managing. The apartments were there, paid for, [27] furnished.

On another occasion the evidence will show Mr. Cash Cole left for three months and was paid. Now the evidence will further show that Mr. Cole not satisfied, so he hired his wife and paid her

\$200 a month, sometimes \$400 a month. She did some work. He also paid her some of that salary while she was in Seattle or California.

Then, Mr. Cole has more family. He has a son, James Cole. He was employed at \$800 a month, given an apartment free. I can't tell you about the furnishings. Given the use of a pick-up. Mr. James Cole made the mistake of letting Seattle Trust, who is servicing the mortgage on the apartment houses, see the books and records of the corporation, so he was fired. The son is gone. But he has another son. So his other son came up and he has been employed. He is there now, \$800 a month. Cash Cole is there at \$1,000, Everett Nowell is there at \$1,000 a month, all of them have free apartments, Cash Cole with two.

Then, Mr. Cole has other relatives. He has some relative who he put on as a watchman. The evidence will show that he watched a little bit, slept most of the time, and he got \$500 a month. I don't know whether he got an apartment or not. He got into a fight with Mr. Cole and he is no longer there. They don't have any watchman. They don't need a watchman. [28]

Mr. Cole has some other relatives. The sons are married. Both of them worked, the wives, two or three hundred dollars a month. The rate was \$1.50 an hour, I think is the way it is set up on the books.

In addition to the two times I mentioned, Mr. Cole was away for long periods. The evidence will show he made a lot of little trips. He sent the bills

for all of the expenses back up here to be paid, hotel bills from Seattle, Pine Crest Lodge, from California, paid by Fairview. The expenses to and fro were were paid by Fairview Development.

The evidence will show that the Mortensen interests have received nothing at any time from the Fairview Development excepting a bad time. The foreclosure action by Rushlight being defended in the name of Fairview by lawyers employed by Mortensen, Mr. Cole sets himself up as manager. Mr. Nowell as president. Are they defending a lawsuit against Fairview? Are they paying the bills? No.

The evidence and records will further show that Mr. Cole employed a lawyer down in Seattle. First he employed the same lawyer that Everett Nowell employed, Mr. Morrissey, who represented him in an endeavor to get a contract which would approve these payments which he [29] had been taking for himself without right.

Then the evidence will show when Mr. Morrissey wouldn't start a lawsuit, there wasn't any basis he could put one on, Mr. Cole employed Mr. Sam Wright in Seattle, and the evidence will show that Mr. Cole went down without even Mr. Nowell's approval or consent and gave Mr. Sam Wright \$2,500 as a retainer. And whose money? Fairview Development—to bring a suit against the National Bank of Commerce and the Mortensen interests, alleging conspiracy. Conspiracy to do what? To pay over the money from the loan to the construction company. That suit is pending. Never approved by

the board of directors. Never approved by the corporation. \$2,500 spent as a retainer. How much more is due I don't know whether anyone knows.

Then the evidence will show that Mr. Cole was unhappy with Mr. Wright's office, so he employs Mr. Horswell of a firm in Seattle, and he calls a meeting of the directors one evening. Everybody attends. The voting trust agreement is shown. Each has one vote on one side. Nothing is accomplished. There is a deadlock. I don't know whether the record will show about payment. A bill was incurred by Mr. Cole without approval of the directors of the corporation. Mr. Horswell didn't accomplish anything, so Mr. Cole hires more lawyers, Mr. Deneke from Portland. Mr. Rushlight says he is a fine man, "he is the man who will get the job done for you." [30] What job? To take over Fairview Manor so Cash Cole will own it. So Mr. Deneke is employed by Fairview. I don't know what Mr. Deneke does. He comes up here from Portland.

That is not the end. Mr. Cole has to keep in with Mr. Nowell because he doesn't have an equal 50 per cent until he does, so he has to go back to Mr. Morrissey's office because Mr. Nowell is loyal and is satisfied with the representation of Mr. Morrissey. So he is back there and Mr. Morrissey represents Cash Cole again and he is paid some money to come back here and attend a meeting. I think that is not right. Mr. Morrissey did not come to the meeting but did come up on behalf of Fairview at the request of Cole.

Then we get to this trial. This is a suit against

Mr. Cash Cole and Mr. Everett Nowell and the Bayview Realty by the corporation, a stockholders' suit. I don't know just how much of the expense has been charged to the corporation, Fairview Development. I know some of it has, and if it wasn't for this lawsuit and this statement the rest of it would be.

The Court: Mr. Diamond, I think we had better have a ten-minute recess at this time.

Mr. Diamond: Thank you. I can use it. [31]

The Clerk: Court is recessed for ten minutes.

(A ten-minute recess was taken.)

The Clerk: Court is reconvened.

The Court: Are you ready to proceed, Mr. Diamond?

Mr. Diamond: Yes.

With reference to the expenses of management, the evidence will show that during the time that Mr. Cole was managing that the long-distance telephone calls have cost the operation something in excess of \$2,500 a year, and the evidence will show that that is because Mr. Cole was not here, and attempting to carry on by long-distance calls while he was still drawing a salary for running the job. I have already mentioned that the evidence will show that Mr. Cole lined himself up with Mr. Rushlight in an effort to cause difficulty and bring about the ownership of the project by himself, or possibly himself and Everett Nowell.

The evidence will show that on October fourth Mr. Cash Cole wrote a letter to the certified public accountant in which he said: "Dear Dick"—that

would be Dick Rushlight. "I think he should have a competent architect," etc. "Don't say anything to Morrissey." That would be Steve Morrissey, Mr. Nowell's attorney, "as I don't want any more talk with them." By that [32] time he was with Mr. Horswell, I believe, and then later back with Mr. Morrissey.

Now, with this expensive management, and the records will show that during 1951, when Mr. Cash Cole and Mr. Nowell came up here, and Mr. Nowell only for a matter of days, took over the management—that was in August—no, it would be after the June meeting, the 11th and 12th, 1951. The apartments weren't available just then to rent but they came up shortly after that meeting when those minutes were passed. There was paid from that time down through December \$14,500 to Mr. Cole and to Mr. Nowell for management.

In addition to that, Mr. Robert Sheldon, an assistant manager, had been employed and he got \$1,351 during that period of time, originally charged to management, and then they transferred it because management expense was getting too high. So the records will show that has been now transferred to office salaries. In 1952 this management cost the Fairview, as the records will show, \$23,000—\$1,000 a month to Cash Cole, and all except one month, 11 months for Everett Nowell.

I don't know what the evidence will show today with reference to that one month as to whether Everett Nowell still has it coming or whether he

doesn't and [33] whether or not he is getting \$1,000 as of the present time.

The books and records will show that Mr. Everett Nowell is not on the payroll, hasn't been since December first, but the testimony in a deposition of Cash Cole will show that Everett Nowell is on the payroll, is earning his money and is entitled to it.

The evidence will also show that Mr. Cash Cole said when he took him off the payroll, "Everett Nowell has never earned any money and there is no reason for carrying him, particularly when we are short of money." What the evidence will show today as to whether Mr. Nowell is being paid or not we can only tell you what the books and records will show.

For this expensive management what do we have? We have a report from the Seattle Trust and Savings Bank representing the mortgage holders and that report shows the most extravagant management any apartment house could have—waste and mismanagement, as shown from the books. The 1951 income tax shows a loss in excess of \$40,000, occupancy 100 percent, loss over \$40,000. The income tax returns were signed by Mr. Cole and the accountant. 1952, a full year's operation, loss: \$56,000. Occupancy, for a short time in 1952 [34] there was an exodus of 90 tenants in one building, a substantial loss for a period of a month in occupancy. Other than that, 100 per cent occupancy. On a percentage basis the occupancy was way up always, but the loss for 1952: 56,000-odd dollars, for management receiving \$23,000. You don't count the apartments,

the pick-ups, the furniture, the trips to California. That is the management.

On a comparable basis, and the evidence will be introduced and show that on a per-room basis, it is just way out of line with any comparable project.

The evidence will show that Mr. Everett Nowell requested before he ever came up here that Cash Cole sign a fiduciary bond and a bond was written by a surety company and application sent to Cash Cole for signature, as required by the bonding company. And the evidence will show that the bonding company, after many months canceled the bond because Cash Cole wouldn't sign an application, and he has been here with the money, tremendous amounts, \$40,000 a month, something like that, coming in in rentals, without a bond and without any control, no stockholders' meetings, no taking up matters with anyone. Occasionally, very occasionally, with Mr. Nowell. Mr. Cole decided that there ought to [35] be a new well built, and he started to build a well, and the evidence will show that his express language was, "To hell with the health department. I don't care whether it complies or not. I know it doesn't." And he built a well. The agreement was that it would be at a cost of some \$15,000—I don't think any definite agreement, but he ended up with that kind of money in a well. He just finished it. I don't know whether he was getting water or not but at the time he finished it the city water runs right by the place. The evidence will show that there are two wells that have been running to the apartment house. The evidence

will show that an additional source of water for emergency would be advantageous. So Mr. Cole, without talking to anyone, or getting any stockholders' approval, starts digging a well in a place that is not authorized. At the time it is finished the emergency water in the form of city mains is right in front of the apartment. \$15,000.

Then the evidence will show Mr. Cole made arrangements, or, rather, the son who was managing while Mr. Cole was away, for that well to be turned over to another project across the street, and because the deal was made by his son Mr. Cole came up and canceled it. [36]

Now, the evidence will show that Mr. Cole, without consulting or taking the matter up with the board of directors, determined that a blower system for disposal of the ash should be put in the apartment houses. Very commendable if you can do it economically. So he spent somewhere in excess of \$15,000 without approval of anyone for a blower system for ashes, which is now in the ash can. It can't be used. It isn't any good. Never was any good. And instead of trying them—there are four buildings and four heating plants, he didn't try one to see if it would work, built four of them and threw four of them away.

Then, the evidence will show that he determined with the help of Mr. Rushlight that there ought to be a blower system on the smokestacks that weren't blowing, so he hired Mr. Rushlight and a man to install a blower system on four of them. He is litigating. \$400,000 worth of litigation between

Fairview Manor and Mr. Rushlight—not Mr. Cole. That is not his lawsuit. That is only the corporation's lawsuit. So the evidence will show that they spent money on this blower system, for four of them. They installed one and then they take it out and throw it away. The parts for four of them are here in Fairbanks. Do with them as you like. Management [37] receiving the kind of money we have been talking about, a board of directors with construction people on it who built the place contacted? No. That is the Mortensen interests. Stay away from them. And the evidence will show more than one person got fired because they talked with the Mortensens or indicated they were friendly to them.

Now, Mr. Cole has started a new project directly across the street from Fairview Manor. He is building 200 units, a little more than that, apartment houses directly across the street from Fairview Manor. As a partner he has Mr. Rushlight, the man he is litigating with, or should be. Going to have a manager, if appointed, in the form of Mr. Cole managing Fairview Manor, with his own project supposed to be finished next year, I guess the early part of next year. It is going to be managed by Cash Cole on one side of the street with an empty new project that he and Mr. Rushlight own, when he is trying to get even with the Mortensens, so if there is any shortage of tenants there can't be much doubt where they are going, with one manager and two projects, with this lawsuit and Mr. Cole in there.

Fairview Development owns a maintenance build-

ing. [38] It has been fixed up. It was a work shop that Mortensens had when they built the place, maintenance building afterwards, it was fixed up as a maintenance building for the project on the Fairview side of the road. Today it is on the other side of the road where they are digging for Cole's and Rushlight's new project.

What else is on the other side of the road? Maybe the evidence will disclose it, I don't know. Mr. Lofquist, who is a certified public accountant, the evidence will show was selected by Everett Nowell. He was a personal friend of Everett Nowell's. As far as the Mortensen interests were concerned he is a competent, honest certified public accountant that has been keeping the books and records. Mr. Mortensen may testify he was over-friendly with Mr. Nowell, but he was the accountant selected and was doing the work.

At the end of 1952 Mr. Cole, secretary-treasurer of this corporation and self-appointed manager, fired Mr. Lofquist without approval of anyone, not the Mortensen interests. I am sure the evidence will show Mr. Everett Nowell did not approve the firing of Mr. Lofquist. So the accountant is gone.

Sometime, I think just a few weeks ago, Mr. Cole employed another accountant. Approval of [39] the board of directors or anyone else? No. Mr. Cole selected him with the help of Mr. Rushlight, and they have a new accountant, Mr. Rushlight's accountant, going over the books.

The evidence will show that Mr. Vine, the new accountant, has determined that all the books must

be gone over from the beginning because Mr. Lofquist didn't know what he was doing, and they are being gone over from the beginning at the cost of Fairview. Mr. Vine is also the accountant for the new project across the street. When he stops working on one project and starts working on another, only Mr. Cole will determine the division of the expense between one project and the other. The evidence will show only Mr. Cole will determine that under the present management.

In October of last year the evidence will show that Mr. Cole decided that there ought to be a meeting of the directors of Fairview Manor, so a meeting was scheduled for October 27. Mr. Nowell called it in Fairbanks. Mr. Nowell agreed to continue it to October 29th because Mr. Cliff Mortensen couldn't be here on the 27th. The evidence will show then Mr. Nowell advised that Mr. Cash Cole didn't care whether Cliff Mortensen could be here or not, that he would have to retract his [40] statement and the meeting would be on the 27th. In the meantime Mr. Mortensen had left for California for a previous engagement. The attorneys for Mr. Cole, at that time Mr. Wright, were contacted and finally they agreed on behalf of Mr. Nowell, the president, and Mr. Cole, that the meeting could be held on the 29th of October, 1952. It was held here in Fairbanks. The notice of the meeting said it was called for the purpose of considering the construction of a generating plant. Mr. Cliff Mortensen came up. I came with him. Mr. Jack Swanson, who is here in the court-room and will testify, he is a lawyer from Seattle in

the employ of the Mortensen Company, as they are not in general practice he has worked for them. Mr. Swanson came along with myself and Cliff Mortensen and we attended this meeting. The others in attendance were Mr. Nowell, Mr. Cole, and no one else. It was held in the office of the Fairview Development. Mr. Swanson had with him a recording device similar to what you have on the desk, and plugged it in and proceeded to take a record of the minutes of the directors. A special trip had been made clear from Seattle to attend this meeting. Mr. Cash Cole pulled the plug and said, "There will be no meeting if there is any recording made of what transpires." [41]

The evidence will show that the fight was on as far as Mr. Cole was concerned. The machine was replugged and Mr. Nowell dictated part of the minutes of the meeting into the machine, his proposal or the information he had learned with reference to the purchase of a new generating plant which Mr. Cole, Fairview Development, should buy and construct at a cost of something in excess of \$125,000, and I guess that was for the equipment and the installation.

The evidence will show that it is purported that the Fairview Development Company would use that plant to develop the juice for themselves and would sell the juice, no account having been taken of the necessity of qualifying with the public authorities for selling public utilities.

I believe the final record will show that Mr. Everett Nowell and Mr. Cole voted in favor of going

ahead with that project though there wasn't any money in the corporation to do it with, and Mr. Mortensen voted against it and Mr. Mortensen pointed out that they each had one vote under the voting trust agreement, so that it did not pass.

Mr. Mortensen then proceeded to make some motions with respect to requiring the directors and officers, [42] Mr. Nowell and Mr. Cole, to make an accounting for their drawings and pay back any money which was found that they had taken wrongfully and have a determination of a reasonable fee to be made to Bayview Realty for managing.

Mr. Cole yanked the machine off so that no recording could be made other than what Mr. Nowell had dictated with reference to that one item and refused, physically refused to permit any recording to be made, so that the only way we could actually have gone ahead would have been to get into a fist fight.

Mr. Cole insisted that Mr. Nowell shouldn't consider or listen to anything there and in loud and abusive language refused to permit the meeting to go on.

The evidence will show that Mr. Cole said something about the Mortensens robbing the construction contract or something and that I stated if there was anything wrong it was the milking of the corporation by Mr. Cole. Thereupon he attempted to start a fight with me, and Mr. Nowell and myself quieted him down, held him back, and then he proceeded to start a fight with Mr. Mortensen and he ran from the meeting room—no swings or blows, but hollering for help at the top of his voice, "There are three to one against me. Someone come in and [43] help."

The man wasn't in his right mind. He came back later and busted up the meeting entirely.

The evidence will show that as long as Mr. Cole partakes in the meeting—we can't hold one without him under the present situation—nothing can be accomplished in any directors, or stockholders' meeting with Mr. Cole.

As a result of that exhibition and the certainty that there was a deadlock which couldn't be reconciled between the stockholders and directors, because they are each equally divided, this suit was started as a stockholders' suit. The action shows that nothing can be accomplished in a meeting because it is a deadlock and we can't hold one.

This action is brought by the plaintiffs for the purpose of preserving the assets of this corporation for the benefit of even Mr. Cole, as his interests might appear, and Mr. Nowell. We are asking in this suit that they account for anything they have wrongfully taken without right and approval and that which is excessive be paid back to the corporation and that they be removed from the management of the corporation.

The plaintiffs, the Mortensens, are not asking [44] that they be placed in management, that they be given any opportunity to do what Mr. Cole has been doing, milking this company for so long. They are merely asking that this management be taken away from Mr. Cole and placed in the hands of someone who will look after the interest of the corporation, not Mr. Cole's interests. That whoever handles the

funds be bonded. That is all that the Mortensens ask.

I might say that the minutes, the evidence will show, subsequently passed in the corporate records as furnished by Mr. Cole, show that on the 27th of October, two days before, this meeting was continued where Mr. Cole acted so outlandishly, they passed a resolution authorizing, just the two of them, Mortensen wasn't there, authorized Cash Cole to go out and buy and construct and build a public utility plant. That is the minutes. So if they are correct, why, he could go ahead and encumber the corporation, borrow money, it provides, whatever is necessary against the hotel or apartment houses if he could do so.

So we are asking that the kind of management which has existed in the past for the benefit solely of Mr. Cole, to some extent Mr. Nowell, be terminated and that the Court protect the interests of the plaintiff [45] corporation.

Our evidence will show the facts as I have outlined them to you.

(Thereupon Mr. Jaureguy made an opening statement to the Court in behalf of the defendants, transcript of which was not requested by the plaintiffs, who ordered the transcript in this case.)

Mr. Diamond: If your Honor please, may I request that we get a copy of the report which counsel has stated is available, so we could see it? We haven't seen it, and we would like to make use of it

in the evening so we won't be delayed during the trial.

Mr. Jaureguy: Yes, I think that is a very fair request, your Honor, and we are now handing him a copy of the report.

Mr. Diamond: All right.

Does your Honor wish to proceed with the testimony?

The Court: Yes.

Mr. Diamond: Mr. Cash Cole, will you step forward and be sworn, please? I would like to call him as an adverse witness. [46]

CASH COLE

a witness called by the plaintiffs, was duly sworn and testified as follows:

Direct Examination

By Mr. Diamond:

Q. Mr. Cole, will you state your full name, please? A. Cash Cole.

Q. And where do you live?

A. Fairview Manor.

Q. Fairbanks, Alaska?

A. Fairbanks, Alaska.

Q. How long have you resided in Fairview Manor?

A. Since around the first of August, 1951.

Q. Where did you live prior to that time?

A. Juneau.

Q. Did you have your own house or a rented place or what? A. I had my own place.

Q. Was it furnished or unfurnished?

(Testimony of Cash Cole.)

A. You mean where I lived?

Q. In Juneau? [47] A. It was furnished.

Q. And your own furniture, or rented furniture?

A. I owned it.

Q. When you moved, did you move that furniture here to Fairview Manor?

A. I sold it with the property.

Q. Mr. Cole, what is your present occupation?

A. As secretary-treasurer and manager of Fairview Manor.

Q. You were elected secretary-treasurer of Fairview Development Corporation, were you not?

A. That is right.

Q. Who selected you as manager of Fairview Manor?

A. It was an agreement, an initial agreement, that gave Mr. Nowell and I the management of Fairview Manor.

Q. A written agreement that gave you and Mr. Nowell the management?

A. Well, it was a written understanding upon which the project was built, you might put it that way.

Q. That Bayview was to have it; isn't that correct?

A. And/or Cash Cole or Everett Nowell. [48]

Q. Do you have such a written document that you may show us?

A. Yes, there is something to that effect.

Q. May I see it, please?

Mr. Jaureguy: Mr. Diamond, I will take a look

(Testimony of Cash Cole.)

and see if I can find it, or I mean I will take a look and I will find it if I have enough time.

Mr. Diamond: Might I go on, counsel, while you are looking for that?

Q. (By Mr. Diamond): Mr. Cole, prior to taking on the duties at Fairview Manor, what was your business and occupation?

A. In the transportation business.

Q. Working for whom? A. Myself.

Q. Under what name and location?

A. Cole Transfer.

Q. Located where? A. Juneau.

Q. And how long had you occupied that position or business? A. Oh, about 45 years.

Q. Will you describe that business, the nature of it, what you did, and the size of it? [49]

A. Contracting and hauling and boat transportation.

Q. Did you have your own equipment?

A. Yes.

Q. What kind, please? A. What kind?

Q. Yes. A. Trucks and a boat.

Q. How many trucks?

A. Oh, six or seven.

Q. How many employees? A. It varied.

Q. From what to what?

A. Oh, from two to three to 25 or 30.

Q. Had you ever been in any other business other than the trucking business?

A. Served as auditor of the Territory for four years.

(Testimony of Cash Cole.)

Q. In Juneau? A. In Juneau.

Q. Mr. Cole, what were your earnings during the time you were running the trucking business and particularly just prior to your moving here in 1951, I believe is the date? [50]

A. More than enough to live on.

Q. And how much was that?

Mr. Jaureguy: I object to that as incompetent, irrelevant, and immaterial.

The Court: Objection overruled.

Mr. Diamond: You may answer, Mr. Cole.

A. Oh, I would say at that time I accumulated about a dock and warehouse that was worth \$50,000, a home that was worth \$15,000, trucks and equipment that were worth \$15,000, and a boat that was worth \$15,000.

Q. (By Mr. Diamond). Did you accumulate any bills and obligations?

A. None that I didn't pay.

Q. Any due as offsets against those assets?

A. I didn't catch the question.

Q. Any bills and obligations which were due as an offset against the assets you just listed?

A. No, except one note in the bank, which was paid.

Q. How much was the note for?

A. At one time \$22,000.

Q. The assets that you listed, then, with the exception of that note, were all free and clear?

A. All free and clear.

Q. The question I asked, Mr. Cole, was not [51]

(Testimony of Cash Cole.)

what assets you had but what your earnings were per month or per year in operating the business. Can you tell me that?

A. Not without records.

Q. Well, approximately?

A. I added it up in assets.

Q. Over 45 years, if you divided that by 45 years, you wouldn't have an accurate statement, would you?

A. I raised a family of three boys in the meantime.

Q. Mr. Cole, were your earnings in 1950, say, just prior to coming here, more or less than \$5,000 a year?

A. They were more than \$5,000 a year.

Q. Do you have the income tax return to show what your earnings were? A. Yes.

Q. Don't you remember approximately what they were? A. Well, you asked for—

Q. I am talking about the year before you came to Fairview now.

A. The year before I came to Fairview, oh, in the neighborhood of \$10,000 a year. [52]

Q. And did that condition exist for many years prior to your coming here?

A. No, there were lean years.

Q. Had you ever had any experience in managing the apartment houses, such as Fairview, before you came here? A. No.

Q. What was your educational background, Mr. Cole?

(Testimony of Cash Cole.)

A. High school education and some time at the University of Minnesota.

Q. You formed, together with others, a corporation known as Bayview Realty, did you not?

A. That is right.

Q. Who formed that, and what was the purpose of it? A. Mr. Nowell, Mrs. Cole, and myself.

Q. Any other stockholders? A. No.

Q. Doesn't Mr. Ken Kato have an interest in that corporation? A. No.

Q. Doesn't he have an option entitling him to stock in that corporation?

A. He did have. [53]

Q. What happened to it?

A. I imagine it has elapsed.

Q. Didn't he in fact exercise that option by notice to you or to Mr. Nowell? A. No.

Q. Have you any reason for saying that it has lapsed?

A. It is just simply that the money that was agreed to be paid for the stock was never paid.

Q. It is your statement now that he has no interest whatsoever and is not entitled to anything out of Bayview? A. He has no interest in Bayview.

Q. Is he entitled to any interest in Bayview?

A. Same answer. He has no interest in Bayview and therefore is not entitled to anything.

Q. Does the majority of that stock belong to you or to Mr. Nowell? A. It is divided evenly.

Q. Was it at the time you started?

A. Yes.

Q. Has it always been divided evenly?

(Testimony of Cash Cole.)

A. With respect to the value of the stock, it has been divided evenly.

Q. Has the right to vote been other than [54] that?

A. There have been three directors.

Q. And you and your wife have controlled that corporation as against Nowell, the right to control it? A. No.

Q. Who did have the voting right?

A. There has never been any question about the right to vote—the ownership, we have never had any difference of opinion on a vote in Bayview.

Q. You have seen a letter which Mr. Nowell wrote in which he said you had taken control of Bayview and unless the funds were tied up so that they did not go to Bayview or were bonded that he would be deprived of his interest.

You saw such a letter?

A. I heard you read a letter, if that is what you refer to.

Q. And you previously have seen it as a part of an affidavit?

A. I never have been served with those papers.

Q. Is there anything to the contents of that letter, as far as you know?

A. I never had possession of the funds of Bayview other than a small amount.

Mr. Jaureguy: I want to object to going into trying to pry out of this witness any possible [55] disagreements years ago he might have had with his co-defendant, Mr. Nowell.

(Testimony of Cash Cole.)

The Court: Objection overruled.

Mr. Jaureguy: Could I have a continuing objection to this line of testimony, your Honor, so I won't have to repeat it?

The Court: Very well.

Q. (By Mr. Diamond): Now, Mr. Cole, the question is whether or not you didn't control Bayview as between you and Mr. Nowell? A. No.

Q. The Bayview Corporation has never been dissolved, has it? A. Never been dissolved.

Q. I think it is true, is it not, that the Mortensen interests, Cliff, Nelse, and Frank, have agreed that you could dissolve it if you so desire for tax reasons; isn't that correct? A. That is right.

Q. And the reason that was requested of them was because Bayview is supposed to have the management and unless they dissolve the management would have to be in Bayview; isn't that right? [56]

A. That is right.

Q. Mr. Cole, Mrs. Cole was employed by you to work for Fairview Development in the management or in some portion of the management of that apartment house? A. Is that a question?

Q. It is. A. Yes.

Q. In what capacity and what compensation?

A. Well, she relieved the bookkeeper for a period of some five or six weeks. When the bookkeeper was hired she was promised time off at Christmas and when Christmas came, why, she took the time off and Mrs. Cole took her place.

(Testimony of Cash Cole.)

Q. That would be in December of 1951?

A. That is right.

Q. Was that the only time that Mrs. Cole worked for the corporation?

A. That is the only time she had charge of the office.

Q. Well, just tell us—

A. She worked other times. She has worked continuously there but she has been on the payroll about 12, maybe 12 or 13 months that she was paid for, and that was at the rate of \$200 a month. [57]

Q. Who hired her? A. I did.

Q. Did the board of directors ever approve her employment? A. No.

Q. Who fixed her salary? A. I did.

Q. And who fixed the increased amount when she replaced the bookkeeper? A. I did.

Q. Is Mrs. Cole a bookkeeper? A. Yes.

Q. And she had worked as a bookkeeper?

A. Yes.

Q. Where and when?

A. She worked as a bookkeeper for me for seven years.

Q. When? A. Oh, from 1935 to 1945.

Q. How much did you pay her at that time, or how much did she earn when she worked for you?

A. I couldn't tell you without referring to the records.

Q. I think, Mr. Cole, if you would speak just a little louder so that we could all hear you, it would

(Testimony of Cash Cole.)

help, and perhaps speak more to the Court, who is more [58] interested in your answers than I am.

The Witness: Can you hear me all right?

The Court: I am having a little difficulty. You better speak a little louder.

Q. (By Mr. Diamond): If you can tell us approximately how much she earned when she worked for you as a bookkeeper.

A. Oh, she would earn \$125 to \$150 a month.

Q. Had Mrs. Cole ever worked as a bookkeeper for anyone other than her husband?

A. I don't know.

Q. When she wasn't working as a bookkeeper for Fairview and she was making, as you say, \$200 a month, what was she doing?

A. Checking apartments, assigning apartments.

Q. How many hours a day?

A. Taking applications for apartments.

Q. How many hours a day, Mr. Cole?

A. Any time from eight o'clock in the morning to ten o'clock at night.

Q. How did you determine that \$200 would be a fair charge to pay your wife with corporate money?

A. I couldn't get anybody else to do work for that amount of money.

Q. You tried other people living in the [59] apartment?

A. Yes, we have had other people working there.

Q. Now, Mrs. Cole was away down in Seattle and California and other places with you during the time

(Testimony of Cash Cole.)

that you were managing the apartment; is that right? A. Yes, on some of the trips.

Q. And her compensation continued while she was away from here? A. No.

Q. In some instances it did, I think, Mr. Cole, did it not?

A. There might have been one month.

Q. How would you justify paying her for that month while she was with you on a trip?

A. Mrs. Cole has kept all the records that have been required.

Q. Did she take them with her?

A. When we took them out with us to Seattle.

Q. You took the records with you, and for that reason you continued to pay her. Did she do that on every trip you made to California, Seattle, and Washington, D. C.? A. Take the records?

Q. Yes. [60]

A. Our reason for being down there was always with an attempt of settlement of this case.

Q. Let's see if I understand you correctly, Mr. Cole. Your reason for being in Seattle was always in connection with a settlement of this case; is that your testimony? A. That is right.

Q. And she always took the records with her?

A. She had kept the records.

Q. I am not sure you have answered my question. She always took the records with her to Seattle on those trips? A. Yes.

Q. Why didn't you always pay her on those trips?

(Testimony of Cash Cole.)

A. Well, I suppose because it would appear, as you would like to make it, that the family was working.

Q. Wasn't the family working? A. Yes.

Q. Now, you have two sons? A. Three.

Q. Three. One of them never worked for the apartment house? A. No. [61]

Q. Where is he?

A. He is between Anchorage and Fairbanks.

Q. You have one son, Jimmy Cole?

A. Yes.

Q. And he was employed to work for Fairview Manor; is that right? A. Yes.

Q. Employed by whom? A. By me.

Q. Did the Board of Directors approve that employment. A. No.

Q. Did the Board of Directors fix his salary?

A. No.

Q. How much was he paid?

A. He was paid \$800 a month and an apartment.

Q. And who fixed the compensation and the apartment for him?

A. It was fixed by a previous employment of a man named Popescue.

Q. Popescue? A. Popescue.

Q. And what do you mean was fixed by him? Did he fix the salary to be paid to your son? [62]

A. At one time he was hired to work there and he said he wouldn't work for less than \$800 a month and his apartment and his expenses.

Q. Now, Mr. Popescue was employed while you

(Testimony of Cash Cole.)

were away for a period of five months from the project, was he not? A. I think he was.

Q. And Mr. Popescue was made the supervisor with all of the responsibilities of the manager of the business project and you were gone?

A. Not of manager. Of maintenance.

Q. He was called supervisor, was he not?

A. No, he was just the maintenance man.

Q. Who took your place while you were gone during that period of five months?

A. It was operated from the office.

Q. By whom? A. Mrs. Scott.

Q. And during that time Mr. Popescue was paid \$800 a month? A. Yes.

Q. When you came back you fired him?

A. No.

Q. What happened? [63]

A. Mr. Nowell let him go.

Q. You fixed the wages as \$800 a month for your son and gave him a free apartment? A. Yes.

Q. Did you furnish it for him, too?

A. No.

Q. He had his own furniture?

A. He had his own furniture.

Q. You gave him a pick-up to use?

A. The pick-ups are there that have to be around the project.

Q. How many? A. Two.

Q. And, therefore, use in connection with the project business?

A. With the project business.

(Testimony of Cash Cole.)

Q. Mr. Jim Cole could use it for his own personal business in the evening, too, could he not?

A. I suppose he has ridden to town in it in the evening.

Q. How long did Jim Cole work there?

A. About a year.

Q. Why was Mr. Jim Cole let out?

A. His wife didn't like the climate.

Q. Do you recall when Mr. Campbell, vice-president [64] of the Seattle Trust Bank of Seattle, Washington, was here on an inspection tour?

A. Yes.

Q. You weren't here, were you? A. No.

Q. He saw Mr. Jim Cole, didn't he; Mr. Jim Cole showed him the books and records, didn't he?

Mr. Jaureguy: I object to that as purely hearsay, your Honor, because he has already brought out by this witness that he wasn't present.

Mr. Diamond: This witness knows, though.

Mr. Jaureguy: That doesn't make any difference even by a witness that knows. Hearsay evidence is not admissible because his knowledge is gained from hearsay.

Mr. Diamond: I would like to have the witness answer, if the Court please. I think it is proper.

The Court: Make your objection again.

Mr. Jaureguy: He has asked the witness about some facts which transpired which he has already brought out took place when the witness was not in town, when he was away from here, and I object on the ground that it necessarily is hearsay.

(Testimony of Cash Cole.)

The Court: If he is willing to accept a less convincing mode of evidence, it is his funeral. I [65] will overrule the objection.

Q. (By Mr. Diamond): I will repeat the question, Mr. Cole. You know that Jim Cole showed the books and records to Frank Campbell of the bank?

A. No, I don't know it.

Q. Didn't Mr. Campbell tell you that?

A. Mr. Campbell told me that he got particular items from the records.

Q. Mr. Campbell also got some information from your daughter-in-law, Mrs. Jim Cole, didn't he?

A. I wouldn't know about that.

Q. Isn't it true, Mr. Cole, that you fired your son right on the spot for that reason? A. No.

Q. Where is your son now?

A. California.

Q. Where? A. Long Beach.

Q. Doing what?

A. I couldn't tell you at the moment.

Q. Do you know his address?

A. I don't know his address.

Q. Now, after Jim Cole left, or before we get into that, Mr. Cole, what were his duties? What did he [66] do?

A. He looked after the mechanical part of the operation of the place.

Q. Had he ever worked for an apartment house project before? A. I couldn't say.

Q. You don't know what your son did?

(Testimony of Cash Cole.)

A. He was thirty-seven years old and he had been away from home for fourteen years.

Q. Was there anyone else working for the project other than yourself and compensation paid to Everett Nowell that made as much as the eight hundred dollars that you paid your son? A. No.

Q. Did you replace the job after Jim Cole left or was fired? A. Yes.

Q. With whom? A. With Tom Cole.

Q. And who is Tom Cole? A. Son.

Q. And how much did you pay Tom Cole?

A. The same wage.

Q. Did the board of directors hire Tom [67] Cole? A. No.

Q. Did they approve his employment?

A. No.

Q. Did they fix his salary? A. No.

Q. Were they told anything about it?

A. No. Only at the end of the year when the annual report was made, or the quarterly report.

Q. Did that show anybody's name?

A. That shows the names and the salaries.

Q. It does? A. I think so.

Q. Or just the salaries?

A. Doesn't it show the name?

Q. I don't think so.

How long has Tom Cole worked for Fairview?

A. About three months.

Q. And what does Tom Cole do?

A. The maintenance.

Q. What kind of maintenance?

(Testimony of Cash Cole.)

A. There are eight boilers there, four boiler rooms.

Q. Does he fire them?

A. And the pump rooms. No, but he sees [68] that they are fired and that they operate. They are operated by an electronic control, which is very complicated and can't be run by just ordinary labor.

Q. Mr. Tom Cole has worked before for a housing project or an apartment house project like this before? A. I don't think so.

Q. You know he hasn't, don't you?

A. Not for certain. He is thirty-six years old and has been away from home for fourteen or fifteen years.

Q. You just saw him just before you hired him?

A. He worked for the Alaska Freight Lines just before I hired him. He had charge of the Port of Seward for them.

Q. Incidentally, does Tom Cole own a truck?

A. He may.

Q. You don't know? A. I am not certain.

Q. He doesn't have any truck around the apartment house?

A. There is a truck there I think.

Q. You don't know whether your son owns it or not?

A. I have never discussed it with him. [69]

Q. Does the apartment house own it?

A. There are a lot of trucks around there.

Q. I think we are talking about a particular one

(Testimony of Cash Cole.)

that you have never discussed with your son. Have you ever discussed that with him? A. No.

Q. What kind of a truck is it?

A. It is a big truck.

Q. Make? A. I don't know.

Q. Would it be a White truck?

A. I think it is a red truck.

Q. Is the make of it a White truck?

A. I couldn't tell you.

Q. Is it ever used for apartment house business?

A. No, not that I know of.

Q. Is it ever fixed up at apartment house expense? A. Not that I know of.

Q. Wouldn't you know?

A. I would. I say not that I know of.

Q. As manager, you would know if it was [70] paid for by apartment house expense, wouldn't you?

A. Just as soon as the report came out or the checks were signed, for that matter.

Q. Did you sign any checks paying for any parts for a White truck belonging to your son?

A. No.

Q. You don't know anything about it?

A. Yes, there were parts purchased for a truck, for his truck, and—

Q. Whose truck?

A. For Tom Cole's truck and a payment made by Tom Cole for those parts. They were ordered by Fairview Manor in order that they get a wholesale price and he has paid for it.

Q. You do know about it, then?

(Testimony of Cash Cole.)

A. I know about that.

Q. What kind of a truck is it?

A. I just say I knew about the parts. I didn't know what the truck was.

Q. And you say his truck, so you know it was his truck, and he owned it? A. Yes.

Q. I had to remind you.

Now maybe you can tell us how much you paid with Fairview money for these parts. [71]

A. The record will show.

Q. Well, approximately, and if necessary get the records.

A. I would sooner let it rest with the records.

Q. I ask that you get the record.

A. It is just a matter of memory with me.

Q. Can you get the record and tell me?

A. I don't have the record right here.

Q. Will you make a note of it and get it so we won't interrupt the trial too long? A. Yes.

Q. Now, to what account were these bills charged, Mr. Cole?

A. I couldn't tell you. Just a general purchase.

Q. It would go to automotive equipment, wouldn't it? A. It might be.

Q. It appears as an expense item on the books for the corporation, doesn't it?

A. It would appear as an expense, with a credit to offset it.

Q. What kind of a credit?

A. When it was paid for. [72]

Q. Has it been paid for?

(Testimony of Cash Cole.)

A. It has been paid for.

Q. As of when? A. As of now.

Q. You mean you just paid for it? A. No.

Q. When was it paid by your son?

A. I couldn't tell you the exact date. The record will show that.

The Court: I think we had better take a little recess, ten minutes.

The Clerk: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

The Clerk: Court is reconvened.

Q. (By Mr. Diamond): Mr. Cole, I notice you carry a package with you. What is it?

A. Just an envelope.

Q. It has something in it. What is in the envelope? A. Not anything of interest to you yet.

Q. Will you mind telling me what is in the envelope, please?

A. It is the report for eight months that has been made. [73]

Q. A copy of what we have just received?

A. Yes.

Q. Thank you.

Now, Mr. Cole, the parts that were paid for by Fairview Manor for your son's truck were about two hundred-odd dollars, weren't they?

A. I don't know about that, Mr. Diamond. I wasn't here when they were purchased and I wasn't here when they were paid for, and we have sent for the records and they will be here shortly.

The Court: Mr. Diamond, it is perfectly satis-

(Testimony of Cash Cole.)

factory to the Court if all the attorneys sit down if they get tired.

Mr. Diamond: Thank you very much.

Q. (By Mr. Diamond): What, specifically, does your son, Tom Cole, do for his eight hundred dollar salary?

A. He manages the hall women, four of them, and three men in the boiler rooms, and two maintenance men, and operates the electrical part of the boiler rooms.

Q. What other help other than those you have just mentioned are there working for Fairview?

A. The bookkeeper and myself.

Q. And he manages everyone except the [74] bookkeeper and yourself?

A. He looks after their work, distributing their work and inspecting it.

Q. And what are your duties?

A. Overseeing the whole thing and whatever is necessary to keep the place going.

Q. You oversee your son, who oversees the rest of your help?

A. Keep an eye on the whole place.

Q. Now, you have some relatives working for Fairview Manor, have you? A. I do have?

Q. Yes. A. No.

Q. You did have, then?

A. There have been other relatives that have worked.

Q. Suppose you tell me who they are.

(Testimony of Cash Cole.)

A. I had a night watchman.

Q. His name, please?

A. Charles Laumeester.

Q. And his relationship? A. A cousin.

Q. Let's get the names of the others now, the names of the other relatives that have worked [75] there.

A. Unless you would call Mr. Peterson, Mr. Art Peterson, a relative.

Q. Do you call him a relative?

A. He is married to a cousin's daughter.

Q. All right. Who else? A. That is all.

Q. Have you forgotten some others? Some daughters-in-law worked there, too, I believe?

A. That is right. Tom's wife has worked there for two months.

Q. She is working there now; is that it?

A. Yes.

Q. And how about James' wife, does she work there, too? A. Not that I ever knew about.

Q. Wouldn't you know?

A. She didn't work there while I was here.

Q. Did you pay no attention when you were away?

A. I say not that I would know. If she worked, I didn't know about it.

Q. Let's talk about Tom's wife. What does she do?

A. She just answers the telephone and looks after the counter. [76]

Q. They live on the project?

(Testimony of Cash Cole.)

A. They live on the project.

Q. They have a free apartment?

A. They have a free apartment.

Q. And how much is she paid?

A. \$1.50 an hour.

Q. And about how much per months has she received?

A. Well, she works five and one-half days a week.

Q. You sign her pay check?

A. No, I think it was signed by Tom and Mrs. Scott. I don't think—

Q. Do you know approximately how much per month she has been getting?

A. I don't know what that amounts to.

Q. Around \$250 a month?

A. I hadn't figured it up.

Q. And I don't suppose you have the records here but you have them coming?

A. They are coming, yes.

Q. And the board of directors never approved her employment either? A. No.

Q. She has only been working the last [77] couple of months? A. Yes.

Q. Who did her job before she went to work?

A. Mrs. Cole when she was here.

Q. You mean your wife? A. Yes.

Q. Isn't your wife still here?

A. Well, she has been working since she has been back without any pay.

(Testimony of Cash Cole.)

Q. Mrs. Cole, your wife, is now working without any pay? A. Yes.

Q. Is that because of this lawsuit?

A. It is because of the scarcity of money.

Q. Does the corporation owe her for her work, then?

A. No, it is just a matter of donation for the benefit of those who participated in the corporation.

Q. Trying to help out the Mortenses?

A. Trying to keep the thing afloat so it won't go bankrupt.

Q. Now, in addition to your daughter-in-law, then, you mentioned a watchman, some kind of a cousin. What did he do? [78]

A. Just patrolled the place at night.

Q. And how long was he working?

A. He worked about a year.

Q. And then what happened? A. He died.

Q. And who is patrolling the place in his stead now?

A. We haven't had a watchman during the summer months. After he got sick, we hired two or three different fellows, depending upon the coldness of the nights. There are something like sixty doors in that place and if somebody leaves them open you can very easily freeze up your heating system.

Q. Who is the watchman there today?

A. We don't have a watchman today.

Q. How much money were you paying for this relative watchman?

A. Five hundred dollars a month.

(Testimony of Cash Cole.)

Q. Five hundred dollars a month?

A. Yes.

Q. And when he died they stopped that?

A. Naturally.

Q. Now, you also mentioned Mr. Art Peterson and what relation was he to you? [79]

A. He is married to the daughter, a cousin's daughter, Mrs. Black's daughter.

Q. And what does or did Mr. Peterson do for the project?

A. He looked after the electric controls in the boiler room and repaired washing machines and driers.

Q. Were those the same electric controls that your sons Jim and Tom were looking after?

A. We eliminated the work on the washers and the driers because it became so expensive that we had an offer from a firm in town that would put in their own and do it on a commission, which was much better.

Q. This electronics work you are talking about that Mr. Peterson did is the same kind of work that your sons Jim and Tom did when they were there?

A. That is right.

Q. Was it the same type of work that Mr. Popescue did when he was paid eight hundred dollars for which your first son took his place was doing?

A. I got Mr. Peterson there because Mr. Popescue didn't understand it, and I paid Mr. Popescue five hundred dollars to look after the plumbing and Mr. Peterson six hundred fifty dollars, which

(Testimony of Cash Cole.)

amounts to \$1,150. Mr. Popescue did not know how to operate the electronic [80] control board.

Q. And so you had Mr. Popescue, without knowing how to operate it, at \$650, and Mr. Peterson at how much?

A. Mr. Popescue at five hundred dollars and Mr. Peterson at six hundred fifty dollars.

Q. And did Mr. Peterson get a free apartment, too? A. No, he didn't live there.

Q. Oh, where did he live?

A. He has a home in town.

Q. So he didn't need an apartment; is that right? A. That is right.

Q. If he needed one, he could have had an apartment which he could have there, couldn't he?

A. Yes.

Q. And he did have the use of the pick-up?

A. No, he had his own car that he went to and from the place in.

Q. And how long did Mr. Peterson work there?

A. Between transportation seasons on the river.

It was just an accommodation.

Q. Just an acommodation for Mr. Peterson? [81]

A. No, for Fairview Manor. We couldn't find anybody in town that could solve the intricacies of those electronic boards.

Q. Mr. Peterson worked on the river, and when he was off work on the river you hired him to work at Fairview Manor?

A. We hired him that winter. He came in

(Testimony of Cash Cole.)

November and stayed until March, when they began to repair their boats for the river work.

Q. What year was that? A. 1951.

Q. You say he came in March?

A. He left in March.

Q. He came when? A. About November.

Q. Would that be the first year that you were operating?

A. Yes, that would be 1951 and into 1952.

Mr. Jaureguy: Could I interrupt to advise the Court and counsel that the books are here?

Mr. Diamond: Thank you, Mr. Jaureguy.

Q. (By Mr. Diamond): Now that the books are here, will you tell me the amount of money that Fairview paid for the parts for your son's [82] truck?

A. You will have to ask the auditor.

Q. You look into the books and get the figure for me. A. You what?

Q. You can find the figure. You are familiar with the books and records.

A. He is familiar with the books and records. I don't keep the books.

Q. The books and records are kept under your supervision? A. No.

Q. Whose supervision? A. Mr. Lofquist.

Q. Oh, now, Mr. Lofquist was fired by you almost a year ago?

A. Those are the books that Mr. Lofquist left.

Q. Yes. A. I never kept the books.

(Testimony of Cash Cole.)

Q. After he left, who was responsible for the books? A. Mrs. Scott.

Q. You don't know anything about the books?

A. Oh, in a general way.

Q. You don't know where the account is with reference to the automotive repairs? [83]

A. Unless you know the key to the books, why, it is a complicated thing to find them. Each account has a number and under different headings.

Q. Well, Mr. Cole, you may ask your accountant to show you where to find the information, but when you see it you are familiar with it, and I would like to have you tell us, as you said you could, when the books were here, the amount of money and the time that was incurred and paid by Fairview for the repairs to your son's automobile or truck. Would you do that, please?

A. If you want, Mr. Vine will give you the information. I have told you that I don't keep the books. I don't know the key to the bookkeeping system and if you want the questions answered readily he can do it for you.

Mr. Diamond: If the Court please, I would like to have Mr. Cole answer the question with reference to the amounts and I think he can talk to his accountant if he likes and tell us what the figure is.

The Court: Yes. We will excuse you from the stand for a moment to go over to your auditor, tell him what you want, and when you get it, bring it back to the stand.

The Witness: Your question again? [84]

(Testimony of Cash Cole.)

Mr. Jaureguy: The Court was instructing you what to do.

The Court: That was the end of the instruction.

The Witness: And you want the amount?

Mr. Diamond: Find the account with reference to your son's truck.

(The witness went over to look at the records.)

Q. (By Mr. Diamond): Mr. Cole, if you will tell us what book you are looking at now and what the item is, and tell us about it.

A. The general ledger, and it is "Other Accounts Receivable."

Q. And what does it show?

A. It shows that there was a charge of seventy-five dollars and a credit of \$144.31; he overpaid the bill \$69.31.

Q. What date did he pay the bill?

A. 8/31.

Q. August 31?

A. 7/31. That auditor's adjustment was 8/31.

Q. Are these records which Mr. Vine made up?

A. No, I think these are Mrs. Scott's.

Q. Mr. Cole, the only thing that is shown there is an auditor's adjustment. There isn't anything to show [85] any obligation from your son, Tom Cole, is there?

A. That is what the bookkeeper gave to me.

Q. Does his name appear any place on that ledger page?

(Testimony of Cash Cole.)

A. It appears some other place, and this is the key number you look up. That is what I explained to you.

Q. Where is the charge as an expense item to Fairview Development with reference to the parts purchased for that truck?

A. I will ask the bookkeeper to point that out and find that.

The Court: Yes.

Mr. Diamond: Mr. Vine, can you step forward and show him that account?

(Mr. Vine came forward to examine the records.)

Mr. Diamond: If your Honor please, I am advised that the information we are asking about is not here; that the detailed information is still in the office, but that Mr. Cole, through his accountant, will have it in the morning here for us.

The Court: Very well.

Mr. Jaureguy: I would like to, if I might, correct that statement. Mr. Vine, as you stated to the Court, is the accountant for the Fairview Development Company and not Mr. Cole's personal accountant. [86]

Mr. Diamond (To the witness): You may sit down.

Q. (By Mr. Diamond): Perhaps we better straighten out: who managed Mr. Vine?

A. I did.

Q. Did the board of directors employ Mr. Vine?

A. No.

(Testimony of Cash Cole.)

Q. Who fixed his compensation?

A. He does.

Q. You don't have any arrangement as to how much he is to be paid?

A. He just makes a minimum charge for his work.

Q. Do you know how much it is going to be?

A. A set charge. No, I don't know what it will total.

Q. Did the board of directors authorize you to employ an accountant?

A. I talked with Mr. Nowell about it.

Q. Did you have any directors' meeting that authorized the employment of an accountant?

A. No.

Q. Isn't Mr. Vine Mr. Rushlight's [87] accountant? A. No.

Q. Do you know that?

A. I know he doesn't work for Mr. Rushlight.

Q. Does he do accounting work for Mr. Rushlight?

A. He might do accounting work for one of Mr. Rushlight's firm.

Q. Which one? A. L. B. McKinney.

Q. Oh, you do know that?

Does he also do accounting for a firm that you are interested in with Mr. Rushlight?

A. What do you refer to?

Q. You tell me.

A. I don't know of any other work he does for Mr. Rushlight outside of L. B. McKinney.

Q. Does he do any other work for you?

(Testimony of Cash Cole.)

A. No.

Q. Does he do any work for Mooreland Construction Company or Mooreland or whatever its name is? A. I don't know.

Q. Aren't you connected with Mooreland?

A. Not in a sense. They might have somebody working for them that I don't know about. They have got men out there working and I don't know who they are or what they do. [88]

Q. Where did you meet Mr. Vine?

A. I met him here.

Q. Did Mr. Rushlight introduce you to him?

A. No, I met him through Mr. McKinney.

Q. And Mr. McKinney is associated with Mr. Rushlight? A. That is right.

Q. And Mr. Rushlight is associated with the L. P. McKinney Company?

A. I think that is right.

Q. You don't know how much it is going to cost the corporation to have Mr. Vine working on their books?

A. I don't know how long it will take.

Q. What is he doing?

A. Making an audit.

Q. Dating back to where?

A. I couldn't tell you. He hasn't decided just where his audit will finish.

Q. Is he going back over Mr. Lofquist's work?

A. He is working it backwards from the date

(Testimony of Cash Cole.)

of the shortage that was discovered back over the records.

Q. Do you know whether you are getting into an expense of hundreds of thousands of dollars with Mr. Vine? [89]

A. I know that it is just what an accountant—we have paid two bills to him for the time up to date. One was, I think, in the neighborhood of seven hundred dollars or eight hundred dollars for the work to date.

Q. Did you fire Mr. Lofquest? A. No.

Q. Is he still working for the corporation?

A. No.

Q. Who terminated his employment?

A. I did.

Q. Did the board of directors authorize your terminating his employment?

A. They didn't have to. There was no money to pay him with.

Q. Mr. Lofquist notified you that you didn't have to have any money, that he would carry on until he could be taken care of?

A. Mr. Lofquist is in Seattle.

Q. That is right, and notified you by correspondence to that effect?

A. He said he would do whatever work was necessary to carry on down there.

Q. And not to worry about the compensation?

A. That is right.

(Testimony of Cash Cole.)

Q. But you had no money so you employed [90] Mr. Vine instead?

A. When an emergency arose here, I employed Mr. Vine.

Q. Outside of Mr. Laumeester and Mr. Peterson, your two sons, one daughter-in-law, and you say maybe your other daughter-in-law, you don't know, and your wife, were any other relatives working for Fairview? A. No.

Q. Do you have any other relatives?

A. Yes.

Q. Now, is Mr. Nowell on the payroll at the present time?

A. He is not receiving any pay.

Q. Does the corporation owe him money for his services?

A. I would say that he had money coming.

Q. At one thousand dollars a month?

A. Whatever can be paid.

Q. It isn't a matter of what can be paid. It is what is owed, Mr. Cole. What does the corporation owe him, the same \$1,000 a month?

A. I would say Mr. Nowell is entitled to \$1,000 a month. [91]

Q. Back for the month of December, 1952, that he wasn't paid?

A. At the time he received his last pay check.

Q. And down to the present time?

A. Down to the present time.

Q. And on into the future at \$1,000 a month?

(Testimony of Cash Cole.)

A. That is right.

Q. It doesn't show on the books and records as an obligation of the corporation, does it, Mr. Cole?

A. I don't understand what you mean.

Q. I mean that the books and records of the corporation do not show an obligation to Mr. Nowell of \$1,000 a month since December 1, 1952?

A. I don't know whether it is set up as an account payable or not.

Q. You are just setting up all of the books new and you are spending money to have it done, or did you tell your auditor what to do with reference to that item?

A. That question hasn't come up yet. He has been busy with checking.

Q. You have just today handed us a statement for eight months of operation.

Which eight months would that be? You have got one beside you in the envelope. [92]

A. Yes, it is up to the thirtieth of August.

Q. Of what year? A. Of this year.

Q. Of this year? A. Yes.

Q. Does that statement show that there is an obligation to Everett Nowell of \$1,000 a month up to the thirtieth of August of this year?

A. I don't think it does.

Q. Take a look at it, Mr. Cole, and tell me.

A. I won't have to look at it. I am telling you I don't think it does.

Q. It doesn't? If you know it doesn't, why doesn't it?

(Testimony of Cash Cole.)

A. I can't tell you that, sir.

Q. It is an obligation of the corporation?

A. I feel it is.

Q. Mr. Cole, you signed an affidavit in connection with this which is on record in the files here. You remember that, don't you? A. Yes.

Q. Let me read you from a copy of that affidavit:

"Everett Nowell received a salary from the time said project opened for occupancy up until January 1, 1953. At that time [93] drastic economies were necessary, so Everett Nowell took himself off the payroll. Up to that time he spent much time in the management of the project."

Is that correct?

A. That is my statement, is it?

Q. Is it correct? A. That is correct.

Q. Up to that time he spent much time in the management of the project. What has he been doing since that time?

A. Isn't he participating in the management of the project?

Q. Is he still spending much time in the management of the project?

A. Yes, I would say that he was.

Q. Why did you say that up until the time he was taken off the payroll he spent much time? Why did you use that language then?

A. Well, that is just up until that time, but

(Testimony of Cash Cole.)

he still is spending time in the management of the project.

Q. Just tell us what Mr. Nowell does. Let's start backwards, like your accountant. [94]

What has he done this last eight months in the management of the project? Just tell us.

A. Our biggest job in the last eight months has been trying to keep this project from going bankrupt due to the loss of some 100 families in the month of—just a little previous to December.

Q. Ninety, I believe, Mr. Cole.

A. I think probably ninety.

Q. It sounds better, one hundred.

A. It would come up—that moved up and down a sliding scale from there, and we were not filled up again until along about April.

Q. Just tell me now what Mr. Nowell is doing in management or working for the project, what time he spent, number of hours, and when.

A. The most of our time was spent on lawsuits.

Q. Just talk about Mr. Nowell's time. Most of his time was spent on lawsuits?

A. Most of his time, too.

Q. What does he do in connection with the lawsuits?

A. Consult with the attorneys continuously. We have spent months trying to get a settlement on this project. [95]

Q. Mr. Cole, haven't you frequently said to parties connected with the project that Mr. Nowell

(Testimony of Cash Cole.)

did not do anything to earn the money he was paid?

Did you ever make that statement? A. No.

Q. You didn't? Is it true? A. No.

Q. Well, what else does he do besides consult with the lawyers?

A. Well, we went to the banks in Seattle to try to raise the money that was needed.

Q. When did you go to the banks?

A. We went to the banks I think it was in January of this year.

Q. How many days did you spend at the bank?

A. We spent about a month in Seattle trying to raise the money from different sources.

Q. What else did you do?

A. Whatever problems may arise about changes in the project.

Q. How much time? I am only talking about the last eight months now. How much time during that period did Mr. Nowell spend in Fairbanks?

A. I couldn't tell you.

Q. Oh, yes, you can. At times you have been [96] here. Approximately how long has he been here?

A. He has been here off and on continuously.

Q. And how long would he be here at a time when he was here?

A. Maybe a week at a time.

Q. And how many times would you say he was here over the past eight months?

A. I couldn't say with any degree of accuracy.

(Testimony of Cash Cole.)

Q. Two or three times?

A. Oh, many times a month, that I think.

Q. Mr. Cole, you remember your deposition being taken by Mr. Sczudlo here a few days ago?

A. Yes.

Q. You answered some questions there. Do you remember saying there that all Mr. Nowell did was consult with you when you wanted to talk to him? Do you remember that? A. That is right.

Q. Is that correct? A. That is correct.

Q. Did he ever handle any of the rents?

A. Not since it opened.

Q. Did he ever do anything about employing any people? [97] A. Yes.

Q. He did? Who? A. Mr. Popescue.

Q. When you were away for five months he came up here and stayed two days hiring Mr. Popescue, who was already working for the project; isn't that right? A. That is right.

Q. Changed his status from maintenance man to supervisor and raised his pay to eight hundred dollars and put him in charge of supervision; isn't that right?

A. Well, not in supervision of the office.

Q. That is right, everything except the office. You wouldn't let him touch the office. What else did Mr. Nowell do?

A. That would about sum it up.

Q. He didn't keep any of the books?

A. No.

Q. He didn't know anything about the books, did he?

(Testimony of Cash Cole.)

A. Do you mean, is he a bookkeeper?

Q. I mean does he know anything about the books of Fairview Development Company?

A. He knows, well, he has gone in, whenever he has been here, and taken a look at the books. [98]

Q. Does he know more about them than you do?

A. I imagine so.

Q. He has an apartment? A. Yes.

Q. And you so testified in your deposition, that he has a free apartment, didn't you? A. Yes.

Q. He spends practically no time in it, does he?

A. Not here steadily.

Q. Mr. Nowell is full time employed by the Alaska Freight Lines, isn't he?

A. I couldn't tell you.

Q. Oh, Mr. Cole, you know that?

A. I know he works for the Alaska Freight Lines.

Q. You know he worked for them for many years, don't you? A. Off and on.

Q. What is there about it that you don't know?

A. You just said steady employment. I know he is working for them at present. I don't know how steady it is.

Q. Hasn't he worked for them all the time he has been interested in Fairview? [99]

A. I wouldn't say.

Q. Who built the bar in Mr. Nowell's apartment?

A. I didn't know there was a bar in Mr. Nowell's apartment.

(Testimony of Cash Cole.)

Q. Did I hear you right?

A. I would call it a counter in place of a table. He simply has a counter there that he uses to sit where he eats.

Q. Let me understand you, Mr. Cole. You don't know that there is a liquor bar in the apartment of Everett Nowell and all you know is there is a counter fixed so that he can sit and eat there?

A. Just the same as you had in a restaurant.

Q. Mr. Cole, there has been plenty of discussion about the bar and the running of water in a sink in connection with it in that apartment over many months, hasn't there?

A. The running of water in a sink?

Q. Yes.

A. I have never heard any discussion about running water in a sink.

Q. You have heard discussion about the bar in Mr. Nowell's apartment on many occasions, haven't you? [100]

(Pause.)

Q. Can you answer that question?

A. No, I haven't heard it discussed on many occasions.

Q. As far as you are concerned, there isn't any bar in that apartment?

A. You might want to call it a bar—any more than that thing you put your books on. It is simply a counter.

Q. Made and built for the serving of liquor and entertaining guests; is that right?

(Testimony of Cash Cole.)

A. I suppose if somebody sat up there to eat they would be entertained or if they had a drink they would be entertained. Do you mean he sells liquor, or something?

Q. Was that apartment furnished, Mr. Nowell's apartment? A. Yes.

Q. Who paid for the furniture?

A. Fairview Manor.

Q. Incidentally, who paid for this counter to eat at in Mr. Nowell's apartment?

A. Fairview Manor.

Q. How much? [101]

A. I couldn't tell you.

Q. Does \$450 sound right?

A. I think the record will show.

Q. You remember hearing a figure about like that?

A. I have heard it discussed. I never did check it.

Q. You don't remember whether that is approximately right?

A. I think I have heard that figure.

Q. What kind of furniture was put in that apartment?

A. Well, there is a hide-a-bed and twin beds.

Q. What else?

A. Dresser, a few chairs, and a lamp.

Q. Who selected it?

A. I guess Mr. Nowell.

Q. And Fairview Manor paid for it?

A. Fairview paid for it.

Q. How much did it cost?

(Testimony of Cash Cole.)

A. About \$2,500.

Q. Isn't it closer to about \$3,100?

A. No, I think about \$2,500 would cover it.

Q. Can you determine this evening what the cost of that is? [102] A. Yes.

Q. And also the furniture in your own place?

A. The two of them amount to about five thousand dollars.

Q. Well, yours amounts to about \$4,100, does it not?

A. No, it is about \$2,500, about the same as Mr. Nowell's.

Q. Will you bring the file down with reference to that item and have it here in the morning?

A. Yes.

Q. We want the specific bills as to type of furniture, and so on. What you purchased, Mr. Cole, was linens, bedding, dishes, silverware for your own apartment, didn't you? A. Yes.

Q. All charged to Fairview?

A. That is right.

Q. Did the board of directors approve that?

A. Well, when we discussed the management contract, where we had the meeting about the management contract, the apartments were included, five per cent and one thousand dollar guarantee and an apartment.

Q. That is the meeting where and when?

A. That was the meeting at the airport with the [103] board of directors.

Q. Well, we will talk about that a little later.

(Testimony of Cash Cole.)

The other apartments in the Fairview Manor are unfurnished, aren't they? A. Yes.

Q. What size apartment do you have, Mr. Cole? What size did you have at the start?

A. Two-bedroom.

Q. And what does that rent for? A. \$165.

Q. Unfurnished? A. Unfurnished.

Q. And at the present time, what do you have?

A. We have an additional apartment added to that with an opening of an efficiency.

Q. When did you take over the additional apartment, Mr. Cole? A. In December.

Q. Last year?

The board of directors know about it and approve it? A. No.

Q. Did Mr. Mortensen or any of them know about it and approve it? [104]

A. No, they didn't have to approve it.

Q. You had to cut a hole in the wall?

A. I cut a hole in the wall.

Q. Who paid for that? A. Fairview.

Q. Who did that work?

A. The maintenance man we have.

Q. You had to take out the kitchen?

A. Take out the kitchen.

Q. Did the board of directors approve of that?

A. No.

Q. Did Mr. Nowell know about that?

A. Yes.

Q. Did he get another apartment, too?

A. No.

(Testimony of Cash Cole.)

Q. Can he have one if he wants one?

A. He hasn't asked for one. The reason for doing that, we had had many requests for more than two bedrooms and we had had a number of people ask if we could cut through the wall so they could have larger apartments, and when we lost the 100 people we had some people from town come out and inquire about a place, and we cut the place through then as a show place.

Q. Did you furnish the rest of the new apartment you took over? [105]

A. No, just about the same furniture spread out.

Q. Did you buy any more furniture?

A. There might have been a few small things purchased.

Q. Who paid for those? A. Fairview.

Q. Do you have a car of your own, Mr. Cole?

A. No.

Q. When you want to go out for your own entertainment or your own use, you use a Fairview car? A. I ride in a pick-up.

Q. A Fairview car, or pick-up? A. Yes.

Q. And your apartment and your furniture is all paid for by Fairview? A. Fairview.

Q. Does Fairview pay for the food?

A. No.

Q. Now, what does the efficiency apartment that you added to your apartment rent for?

A. \$125.

Q. The apartment together with that you now occupy would rent for \$290 a month, wouldn't it?

(Testimony of Cash Cole.)

A. Yes. [106]

The Court: I think this would be a good time for a recess.

Mr. Diamond: Thank you.

The Court: Ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

The Clerk: Court is reconvened.

The Court: Are you ready to proceed?

Mr. Diamond: Yes, your Honor.

If your Honor please, with reference to the matter of these books, I understand Mr. Vine would like to get away, and I have no desire to detain him for this evening, but we have an accountant that has been trying to take a look at the books, too, and now we have got some here and some out there. I am sure that the witnesses are going to require the books here in the courtroom. I would like to suggest that the books be made available in the courtroom and subject to both sides seeing them here or in the jury room, perhaps, so that they would be accessible and available without any undue delay or without keeping Mr. Vine or anyone else around when they wouldn't want to be.

I think that is a feasible suggestion and I would like to suggest that the books be brought here on that basis and available. [107]

The Court: So ordered.

Mr. Jaureguy: No, objection from our standpoint, I am sure, your Honor.

The Court: I beg your pardon?

(Testimony of Cash Cole.)

Mr. Jaureguy: I say there is no objection from our standpoint. We brought over so far what he wanted.

The Court: Very well.

Mr. Diamond: May I inquire, would the jury room possibly be open in the evening where the accountant could look at the books and work on them or not?

The Court: Not very well. However, would you have him there at night? Would you want him to use them?

Mr. Diamond: Yes, I would. Perhaps early in the morning, too, 8:00 o'clock or so.

The Court: I doubt if they will be available at that time in the morning, but it is a little difficult to arrange.

Mr. Clerk, do you have any suggestion?

The Clerk: I could give whoever is going to look at them my key, your Honor, to the gate out here, and they could get through and be available if it is all right with both parties and the Court, and I would not take any further responsibility for them. I have a key to that gate I could give to [108] somebody.

Mr. Diamond: It is agreeable to us if it is agreeable with counsel. The only ones I would permit to have access to the books is Mr. Martin. I believe you are a certified public accountant?

Mr. Martin: No, not certified.

Mr. Jaureguy: I wouldn't want to restrict you at all, but I know you wouldn't let anybody in that

(Testimony of Cash Cole.)

wasn't perfectly reliable, so that you are not restricted to him.

Mr. Diamond: Fine.

Mr. Jaureguy: And that you will, of course, cooperate with us to the extent, for instance, if you get suspicious that maybe there is a little risk in it, that you will advise us.

Mr. Diamond: Fine, I will do so.

Mr. Jaureguy: It is just as important for you as it is for us that those books are available and nobody will get away with them.

Mr. Diamond: That is fine. Is there some way this key can be made available to both sides?

The Clerk: I have the one key. If you all can get together and meet, you can have this key.

Mr. Jaureguy: Now you have asked several questions. [109]

Mr. Diamond: Do you have any objection to my taking the key and if you want it you can holler?

Mr. Jaureguy: All right.

Mr. Diamond: When can we have the books down here? They are not all down here. And the records.

Mr. Jaureguy: I think the accountants seem to agree it would be better for us to have the books stay out there and then they can get in the office and see them.

Mr. Diamond: It is agreeable with me, if the accountants desire that. You make arrangements, Mr. Martin, then, to get access to what you want.

Mr. Martin: Fine.

(Testimony of Cash Cole.)

Mr. Diamond: All right, we will do it that way. I am sorry.

Q. (By Mr. Diamond): Now, Mr. Cole, you are familiar with the income tax return made for the year ending December 31, 1952?

A. Yes, there was one made.

Q. And you signed it, I believe, and sent it in, didn't you?

A. I don't remember whether I signed or Mr. Nowell signed. [110]

Q. You know, do you not, that it showed the salaries paid to you and Mr. Nowell as \$23,000, \$1,000 short of each of you getting \$1,000 a month, you know that, don't you? A. No.

Q. You know that Mr. Nowell was not paid \$1,000 for the month of December?

A. You mean for 1952?

Q. Yes, that is right. A. That is right.

Q. And you know there were salaries then of \$23,000 for the two of you and not \$24,000?

A. Yes.

Q. The \$24,000 was due. Your testimony now is that the corporation owes Mr. Nowell the other one thousand dollars; is that right?

A. I would say so.

Q. And the tax return would be wrong, wouldn't it?

A. Unless you want to carry it over into next year. If it wasn't paid they couldn't collect any withholding or any social security and it would be treated as of the year it was paid in.

(Testimony of Cash Cole.)

Q. As far as the corporation is concerned, it is on an accrual basis, so that it would be a [111] proper expense and should be in the income tax return of the corporation as an expense?

A. That must have been Mr. Lofquist's judgment on it, that he saw free to treat it that way.

Q. Mr. Cole, didn't you write a letter down to Mr. Lofquist and tell him that as of December 1, Mr. Nowell was off the payroll?

A. I told him he wasn't being paid.

Q. Isn't that the reason it was left off?

A. I don't know.

Q. As a matter of fact, Mr. Cole, you and Mr. Nowell were having quite a feud over the matter of Mr. Nowell being taken off the payroll, weren't you?

A. No, we didn't have any feud.

Q. Did you have any words over it?

A. Mr. Nowell wondered why he didn't get his pay.

Q. And there was some difficulty between the two of you, wasn't there, over it?

A. No, there just was no money.

Q. Isn't it true that in order not to lose his support in connection with this lawsuit and other lawsuits you agree to pay him now for the back wages at one thousand dollars a month? [112]

A. There is no different attitude on my part than there ever was. Mr. Nowell agreed in the management the same as I did whether I did all the work and we shared it or both worked together in it.

Q. Did you do all the work?

(Testimony of Cash Cole.)

A. No, but I say whether I did do all the work.

Q. Did Mr. Nowell do an equal amount of work?

A. No, he wasn't here all the time.

Q. Did he do less work than you did?

A. I think we have gone into that.

Q. Just answer that. A. Yes.

Q. He did less work than you did?

A. Yes.

Q. Was he overpaid or were you underpaid?

A. There was never any argument about that.

It was based on the original agreement of one thousand dollars apiece.

Q. Did the corporation receive the value of one thousand dollars worth of work from Mr. Nowell?

A. From Mr. Nowell and Cole together.

Q. No, Mr. Nowell received \$1,000 a month, and as manager of the corporation, I am asking if the corporation received value for its money? [113]

A. I would say that we held the contract jointly and that jointly it rendered that much service.

Q. You won't answer my question?

A. Whether I did the most of the work or not?

Q. Can you answer the question I asked you as to whether Mr. Nowell rendered \$1,000 worth of service to the corporation?

A. In consideration of the agreement he did.

Q. When you took him off the salary, why didn't you cut yourself off to reduce it? You were short of money.

A. There was a serious question of whether I would or not for a while.

(Testimony of Cash Cole.)

Q. That was what Mr. Nowell wanted you to do, was it not?

A. Yes—no—I say, "Yes." He never said anything about me being off the salary. I was here and working and there was never any discussion along that line.

Q. As long as Mr. Nowell receives the same compensation as you do then he is on your side in this difficulty that has been going on with Mortensen, isn't he?

A. I think Mr. Nowell looks at it from a wrong and a right point of view. It isn't a matter [114] of buying Mr. Nowell's support, as you intimate. Mr. Nowell has his own mind and makes up his own mind and has his own judgment about this thing, and if he thinks it is fair and just, I feel positive he will stand on the side he picks and it won't be a matter of me paying him or me not paying him, as you intimate.

Q. Now, the records which you have for the eight months do not show an obligation by the corporation to Nowell for \$1,000 a month; that is right, isn't it?

A. I haven't had an opportunity to go over it closely.

Q. You told me you didn't have to look at it, you knew. A. Yes.

Q. Why was it left out?

A. I don't know.

Q. You are going to have to redo it all now. aren't you, to put it back in? A. No.

(Testimony of Cash Cole.)

Q. What are you going to do?

A. I don't know how it will be handled.

Q. So that we understand each other, it will reduce the profit or else will increase the loss to Fairview when you put it back in where it belongs?

A. Yes, it will be an expense. [115]

Q. In 1952, besides the \$23,000 paid to you and Mr. Nowell for management, and really it should have been \$24,000, you paid Mr. Popescue \$2,700 for management, too, didn't you?

A. Yes. I don't know what it adds up to, but the number of months he worked there.

Q. And you also paid Mr. Robert Sheldon \$543.92 for management? A. For what?

Q. For management.

A. Well, if you would call it that. He was doing all types of work.

Q. It was charged to the management account in 1952 and somebody just recently now requested that it be taken out by Mr. Vine and charged some place else? A. That would be right.

Q. Did you tell them to do that?

A. It wasn't management.

Q. Did you tell Mr. Vine to do that?

A. No, I think in the distribution of that that was made up, Mrs. Scott was working on an analysis that would show more distribution. The books as originally set up did not distribute the labor. For instance, it shows for the twenty-three—twenty-five months of operation that the janitorial services were \$103,000. If you hired a carpenter out

(Testimony of Cash Cole.)

there or [116] a fireman, when he was paid he would be placed over in the janitor column, which is not the true situation.

Mr. Diamond: May I have this marked as an exhibit?

The Clerk: Plaintiff's Identification No. 1 and Plaintiff's Identification No. 2. 1951 is Plaintiff's Identification No. 1 and 1952 is Plaintiff's Identification No. 2.

(The 1951 income tax return was marked Plaintiff's Identification No. 1. The 1952 income tax return was marked Plaintiff's Identification No. 2.)

Q. (By Mr. Diamond): Now, Mr. Cole, you mentioned Mrs. Scott. She was the bookkeeper working on the books at Fairview Manor?

A. Yes.

Q. And she was working under you?

A. No, she worked under Mr. Lofquist.

Q. Who did she take orders from?

A. Mr. Lofquist. She kept the books absolutely as he set them up and made no changes in entries unless he told her so. According to your letter that you wrote to Lofquist the whole situation about the money was set up by you. You said that Lofquist would have to be the [117] man that would have charge. He would check the cashier, place her under bond and institute the books, and, therefore, she was the one that was placed under bond, and when you asked me for a bond, I never handled any money at

(Testimony of Cash Cole.)

Fairview. Nobody but Mrs. Scott ever handled any money there or nobody but Mrs. Scott ever handled the books with the exception that Mrs. Cole was there during her vacation. There were never any changes made, at my instructions, as to how the books should be kept until here in the last thirty days.

Q. So the entries as made by Mrs. Scott were made as she thought they ought to be made?

A. As Mr. Lofquist pointed out.

Q. Now, Mr. Cole, handing you what has been marked Plaintiff's Exhibit A for identification, I ask you if you can tell me what that is? I might also tell you that it is an income tax return copy that I obtained from your lawyer Saturday. Can you answer the question?

A. What was your question?

Q. I asked you if you can identify Plaintiff's Exhibit 1 for identification, and tell us what it is.

A. I thought you answered the question. You said it is an income tax return. That is what it [118] says on the head of it, and I will agree with you, that is what it looks like.

Q. Will you agree it is the income tax return for the year 1951 for Fairview Development Corporation?

A. That is right.

Q. Will you agree that it was prepared by the accountants and sent in by the accountants and you for the company?

A. This is a copy that Mr. Lofquist sent from Seattle for our office record.

(Testimony of Cash Cole.)

Mr. Diamond: I will offer Exhibit 1 in evidence.

Mr. Jaureguy: We have no objection, although we may at some time wish to substitute a photostatic copy.

Mr. Diamond: I have no objection to that, if you wish to do so.

The Court: Very well. It may be admitted.

The Clerk: Plaintiff's Exhibit A.

(The income tax return for 1951, previously marked Plaintiff's Identification No. 1, was received in evidence as Plaintiff's Exhibit A.)

Q. (By Mr. Diamond): Handing you Plaintiff's Exhibit 2 for Identification, I will ask you if you can tell us what that is? [119]

A. United States corporate income tax, 1952, Fairview Development, Incorporated.

Q. Do you recognize it? A. Yes.

Q. As something you had in your possession and from your records?

A. I think I gave it to Mr. Sczudlo.

Mr. Diamond: I will offer it as Exhibit 2 in evidence.

Mr. Jaureguy: No objection.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit B.

(The income tax return for 1952, previously marked Plaintiff's Identification No. 2, was received in evidence as Plaintiff's Exhibit B.)

Q. (By Mr. Diamond): Mr. Cole, the two

(Testimony of Cash Cole.)

apartments which you now occupy, you occupy those free of rent, don't you? A. Yes.

Q. And you don't pay anything for the use of the furniture which belongs to the corporation?

A. No.

Q. Does the corporation have an inventory in its records of the furniture in your apartment? [120]

A. Yes.

Q. Who has that?

A. It is in the files at Fairview Manor.

Q. Can you bring that down with you tomorrow? A. Do you want the—

Q. And also the inventory of Mr. Nowell's?

A. Yes.

Q. Who pays the utilities for your apartment?

A. Fairview Manor.

Q. And the utilities include what?

A. Electricity.

Q. Heat, light, water, and telephone?

A. Telephone.

The Court: How was that? Only telephone?

The Witness: Pardon?

The Court: Does it only include the telephone?

The Witness: It includes the telephone and the electricity.

The Court: And the heat?

The Witness: The heat is furnished to everybody.

The Court: And the water?

The Witness: And the water is furnished with it.

The Court: Very well. [121]

(Testimony of Cash Cole.)

Q. (By Mr. Diamond): You don't personally pay for any utilities? A. No.

Q. The other apartments which are rented out, do the tenants pay for their electricity?

A. Yes.

Q. And they also pay for their telephone, if they have it? A. For telephone.

Q. They get water free?

A. Water, heat, stove and refrigerator.

Q. The use of a stove and refrigerator, but they pay for the electricity?

A. They pay for the electricity.

Mr. Diamond: Mr. Clerk, will you mark this as an exhibit, please?

The Clerk: Plaintiff's Identification No. 3.

(Photostatic copy of letter from Mr. Cole to Mr. Lofquist was marked Plaintiff's Identification No. 3.)

Q. (By Mr. Diamond): Mr. Cole, handing you Plaintiff's Exhibit 3 for identification, I will ask you if you can identify your signature on this photostatic copy of a letter? A. Yes. [122]

Q. And that is a photostatic copy of a letter that you wrote to whom? A. Lofquist.

Q. The accountant.

I will offer Plaintiff's Exhibit 3 for identification in evidence.

Mr. Jaureguy: There will be no objection.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit C.

(Testimony of Cash Cole.)

(The photostatic copy of letter from Mr. Cole to Mr. Lofquist, previously marked Plaintiff's Identification No. 3, was received in evidence as Plaintiff's Exhibit C.)

Q. (By Mr. Diamond): Mr. Cole, I believe you stated—I am not sure—that the Fairview Manor was 100 per cent occupied at the present time?

A. No, not at present. There is some moving out.

Q. Normal turn-over? A. Yes.

Q. It is for the most part running about 100 per cent full, isn't it?

A. It has been pretty well filled up since about May. [123]

Q. That is when you had the trouble over the ninety that went out?

A. Well, from December up to May.

Q. Do you feel, Mr. Cole, that there is still an excessive demand for apartments, living quarters, in the City of Fairbanks? A. Yes.

Q. Now, you are presently engaged in constructing a new housing project?

A. I have an interest in it.

Q. What kind of interest and where is it located?

A. It is right across from Fairview Manor.

Q. Right across the street? A. Yes.

Q. Directly. And how large a project is it?

A. Two hundred units.

Q. Compared to Fairview having how many?

A. 272.

Q. And what kind of units are they going to be?

(Testimony of Cash Cole.)

A. One bedroom, two bedrooms, and three bedrooms.

Q. Is that what you have in Fairview?

A. No, you just have efficiencies, one bedrooms, two bedrooms, and there is a big demand for larger units for large families. [124]

Q. You say you are associated or connected with that project. Who else is connected with it?

A. Mr. Rushlight.

Q. You went in it as a joint venture?

A. Yes.

Q. Is the construction under way?

A. Yes.

Q. What is your official position with the project?

A. I am just the president of the corporation.

Q. That owns it? A. That owns it.

Q. You are managing it?

A. That hasn't been settled.

Q. As president of the corporation, you anticipate you will manage it?

A. I don't know. I haven't decided.

Q. Do you feel, Mr. Cole, that you could manage two projects, one on one side of the road owned by different people?

A. Yes. With all the shortcomings that we have found at Fairview Manor we can remedy in Mooreland Court and it will be much easier to manage from an operational standpoint. [125]

Q. You can easily move the tenants from Fairview Manor to Mooreland?

(Testimony of Cash Cole.)

A. It will be much cheaper.

Q. And I say, you can move the tenants from Fairview over to Mooreland Court?

A. A tenant usually makes his own choice.

Q. Dependent on the rental charged by management?

A. And what you have to offer and, I think, Fairview Manor today is looked upon as as good a place as there is in Fairbanks or probably better, and the water at Fairview Manor is better than any other place.

Q. Mr. Cole, you know that there is a lawsuit brought by Mr. Rushlight or his company against Fairview Development Corporation?

A. I don't think you state it correctly. The lawsuit is against the contractor and not against Fairview. We had no contract with Mr. Rushlight, Fairview Manor.

Q. Mr. Cole, don't you know that the lawsuit is a lien foreclosure against Fairview Corporation as defendant?

A. That is correct, and I might say that you, as representing the contractor, permitted that lien to be placed on there and kept on there, while you took all the money left in Fairview Manor's treasury and put it up for security for the contractor. The contractor, [126] in order to secure the title for the Kansas City Title and Trust, and that has been very much to the detriment of Fairview Manor, because we ran out of money here this winter. We could not borrow a nickel from any bank and it

(Testimony of Cash Cole.)

was because of the lien that was on Fairview Manor, although we had given every dollar that we agreed to for the construction of that place.

Mr. Diamond: That is a long answer and is not responsive to anything, and I think if we would try to straighten it out it would take the rest of the evening, so I better move it be stricken as not responsive.

The Court: It may be stricken.

Q. (By Mr. Diamond): You say you do know that there was a lawsuit brought by Rushlight against the rest of the Fairview Development Company?

A. I know there is a lawsuit against Mr. Nelse Mortensen and Mr. Rushlight has a lien on Fairview Manor.

Q. You don't know he is suing to foreclose that lien and take over the property?

A. That may be so, if the contractor can't pay the bill.

Q. As manager of the apartment house and secretary-treasurer of the corporation, what have you done [127] to look after the defense of that lawsuit, Mr. Cole?

A. Mr. Nowell and I have tried at various and sundry times to get a settlement. We tried to get the money, the \$311,000, when it came to Fairview Manor to be left in their hands and we attempted to call the parties together and have a board appointed who would decide what was a fair price for settlement.

(Testimony of Cash Cole.)

Q. Have you done anything about hiring or employing any lawyers to defend the corporation in connection with that lawsuit? A. No.

Q. You have been closely associated with Mr. Rushlight all during the time the litigation has been pending between Rushlight and Fairview Development, haven't you? A. We are good friends.

Q. As a matter of fact, you have been furnishing him all the information with reference to the operation by Fairview, haven't you?

A. Oh, nothing that is a secret, nothing that would help him in any way or make any difference in the suit he might have.

Q. Mr. Cole, now, out at Fairview project there is a little building that was used by you as a [128] maintenance shack that was built originally by Nelse Mortensen-Alaska, the construction company, isn't there? A. Yes.

Q. And I believe that you or Fairview Development put some additional siding on it and used it as a maintenance house for the project?

A. I think the contractor left it there as something they used.

Q. Didn't Fairview Development use it as a maintenance house?

A. When that was all we had. It was too small.

Q. Where is that building now?

A. It has been rented to Mooreland Court contractors.

Q. Did the board of directors approve that rental? A. No.

(Testimony of Cash Cole.)

Q. That is renting the Fairview property to yourself, isn't it? A. No.

Q. Who did you rent it to?

A. Mooreland contractors.

Q. That is you and Mr. Rushlight?

A. No. I am not a contractor. [129]

Q. It is Mr. Rushlight, then?

A. It is Rushlight and Associates.

Q. What rental has been arrived at?

A. Seventy-five dollars a month.

Q. Did the Board of Directors approve that transaction? A. No.

Q. Does that appear on the books and records of the corporation? A. It will.

Q. Does it now?

A. It has just been rented.

Q. When? A. Oh, about two weeks ago.

Q. Now that we have this lawsuit, it will appear on the books?

Mr. Jaureguy: Your Honor, I move that question be stricken as improper.

Mr. Diamond: I have no objection. It may be stricken.

Mr. Jaureguy: I don't believe it is pertinent.

The Court: Yes, it may be stricken.

Q. (By Mr. Diamond): Who does that building belong to?

A. I think the contractors have a bill. [130] They are charging us \$4,200 for it. I suppose it belongs to Fairview Manor, whether they like the price or not.

(Testimony of Cash Cole.)

Q. Do you know whether Fairview owns it or not?

A. We have it. We have possession of it and we have been charged \$4,200 for it.

Q. What other property have you rented to Mr. Rushlight or Mr. Rushlight and yourself, whoever is engaged in that project? A. None.

Q. That is the only item?

A. Outside of apartments, that is more rent.

Q. How many apartments have you rented to him?

A. Oh, they have three or four apartments that they have had rented over a period of two years.

Q. Mooreland Construction hasn't been in existence for two years.

A. They simply transfer them. We rented first to Rushlight Macri and then L. P. McKinney and then Mooreland Contractors.

Q. Now, Mr. Cole, in December, 1951, right after Christmas, you went south for a period of five months, I believe you testified December 26th or right after Christmas, 1951, you went south for a period of approximately five months? [131]

A. I would have to check that to be sure.

Q. Well, check what, because it is an approximation?

A. I have been south so many times on this thing I would have to just refresh my memory to tell.

Q. Mr. Cole, in your deposition you were asked these questions and you said you would check your

(Testimony of Cash Cole.)

date book and you would know and you would have that information.

A. Yes (witness opening envelope).

Q. That is the file that only has the accountant's report in it, remember?

A. That was December of 1952?

Q. No. A. 1953?

Q. No, 1951.

A. 1951. I went south in February.

Q. In February? A. February.

Q. Mr. Cole, what are you endeavoring to read from? A. From minutes from a day book.

Q. Your day book, or something you made from your day book?

A. Made from the day book. [132]

Q. Where is the day book?

A. The day book is at my house.

Q. Would you bring that down here tomorrow, that day book, please?

A. There is a lot of other things besides this record.

Q. I would like to see it.

A. A lot of other business that has nothing to do with the case.

Q. You can point out the pages I will be interested in, if you will have your day book, please.

Mr. Jaureguy: If counsel will agreed that he will look at the pages that the witness designates then I think there would be no objection to bringing it, but very often that is just a lead.

Mr. Diamond: Well, I will agree that Mr. Cole

(Testimony of Cash Cole.)

can retain possession of the day book and point out to me the pages that he is referring to.

Mr. Jaureguy: Well, you gave me more than I asked for, so that is all right.

Mr. Diamond: Yes, sir.

Q. (By Mr. Diamond): Besides the memorandum you made from your day book, what else do you have in your file, Mr. Cole? I asked you once before and I got an equivocal [133] answer. What else do you have there? A. The reports.

Q. And what else besides the reports?

A. That is all.

Q. You have a list of the dates that you were down south? A. Yes.

Q. All right. Now, don't you find that you were down south in December of 1951 until about May 27—it might have been May 20, 1952?

A. I was down and back.

Q. Tell us when, then.

A. January (witness refers to papers)—January sixth in Seattle.

Q. You went down?

A. On disposition of the ten per cent money that was retained in the bank that you wanted to get released—

Q. You are wasting a lot of time, Mr. Cole; if you will just answer the question and then you can explain. A. Yes.

Q. On January 6th you went down. Is that the first time after Christmas of 1951 that you went south? A. Yes.

(Testimony of Cash Cole.)

Q. And how long did you stay down there? [134]

A. After January I stayed down until May 24th.

Q. May 24, 1952. That is about 4½ or 5 months— A. Yes.

Q. ——that you were down south. Who paid your trip down? A. Fairview Manor.

Q. And who paid your trip back?

A. Fairview Manor.

Q. Where did you stay when you were in Seattle? A. At the Claremont.

Q. Did your wife go with you? A. Yes.

Q. She stayed there, too? A. Yes.

Q. Who paid your expenses at Claremont Manor while you were there? A. The Claremont?

Q. At the Claremont Hotel.

A. Fairview Manor.

Q. Did that include your wife's expenses, too?

A. We charged so much for a room and eight dollars a day for subsistence. [135]

Q. You charged eight dollars to Fairview for your subsistence? A. Yes.

Q. Did that go on for five months?

A. For the time I was away.

Q. All that time? A. All that time.

Q. You told me earlier that you were only down in Seattle on business in connection with the lawsuits; is that right? A. That is right.

Q. You spent that five months in Seattle in connection with litigation?

A. And discussion with you people.

Q. All that five months in discussion and litigation? A. Discussion and waiting.

(Testimony of Cash Cole.)

Q. As a matter of fact, in January, 1952, there wasn't any litigation, was there? There weren't any lawsuits then? A. No, it was settlement.

Q. There were discussions, yes—

A. Yes.

Q. —but not for five months, Mr. Cole, were there? [136]

A. Yes, it went on. We met during that time off and on every month.

Q. Mr. Cole, do you think you saw me during that time more than half a dozen times for an hour at the most on each occasion?

A. I may not have seen you but our lawyers did.

Q. Who were your lawyers at that time?

A. Morrissey and Hedrick.

Q. And during all that time you were drawing \$1,000? A. That is right.

Q. And during the first month of that time your wife drew \$200 a month while she was down there, didn't she?

A. I think the first month of 1952.

Q. Now, during that period of time didn't you go down to California? A. Yes.

Q. How would you confer with me in Seattle if you were in California?

A. There was a period there of about three weeks when Mr. Morrissey and Mr. Henderson were out of town.

Q. You didn't come back to Alaska; you went to California? [137]

A. I went to California.

(Testimony of Cash Cole.)

Q. Who paid your fare down to California?

A. I did.

Q. Fairview didn't pay that? A. No.

Q. But who paid the fare or the bill at Pine Crest, where you stayed?

A. The subsistence, Fairview.

Q. Paid for your hotel and your meals?

A. Paid for the subsistence.

Q. How long were you in California?

A. Oh, about four weeks.

Q. Eight dollars a day and your hotel bill?

A. Yes.

Q. And \$1,000 a month from the Fairview Manor? A. Yes.

Q. Your apartment up here was kept for you and was kept vacant all the time you were gone?

A. Yes.

Q. Did you do any conferring with the lawyers and with me during that time you were in California?

A. No; there was a kind of stalemate for that period.

Q. Mr. Cole, weren't you sick? [138]

A. I wasn't feeling very well.

Q. Didn't you go down there for your health?

A. Well, it was a matter of whether I stayed in Seattle or went to California and the climate was warmer down there and I just went to California.

Q. Weren't you under treatment by doctors down there?

A. I went through a clinic while I was there.

(Testimony of Cash Cole.)

Q. Did you have some kind of an operation?

A. A slight one.

Q. I guess I have to dig everything out, don't I, Mr. Cole? You went down there actually for an operation and because of your health and because you weren't well and not on company business; isn't that right?

A. No; it was just a question of where I waited.

Q. You were so ill when you went down there you weren't even sure you were going to come back; isn't that right?

A. I was pretty well worn out from operating this place from 6:00 in the morning until 12:00 o'clock at night.

Q. And you had to go down there for an [139] operation?

A. I just went down and had a check-up.

Q. And an operation? A. A slight one.

Q. Who paid for the operation? A. I did.

Q. Not Fairview? A. Not Fairview.

Q. When you left here, Mr. Cole, you had Mr. Sheldon as assistant manager and you had Mr. Popescue. Mr. Sheldon at five or six hundred dollars a month as assistant manager or supervisor or whatever you might want to call him. You had your cousin, Mr. Peterson, as an assistant manager or supervisor or whatever you want to call him, doing the work that subsequently you say your sons took over, and you also had Mr. Popescue, all of them receiving somewhere between five and six hundred a month plus an apartment; is that right?

(Testimony of Cash Cole.)

A. You don't state their positions correctly, is all. Those people were working.

Q. And which one of them did you leave in charge when you left? A. Mr. Peterson.

Q. Mr. Peterson, your relative. Did he stay in charge? [140] A. No.

Q. What happened?

A. He went back to work on the river boats, I think, in March.

Q. But in January and February and until he left in March he was there? A. Yes.

Q. But you still had some difficulty that arose and it was necessary to have a manager or someone, a supervisor in charge of the project, was it not?

A. Mr. Peterson was.

Q. During all that time?

A. Yes, up until he left.

Q. In March?

A. Yes, I think it was March he left.

Q. That is when he left, but you do know, do you not, Mr. Cole, that Mr. Popescue was appointed as a supervisor in charge of everything except the office by Mr. Everett Nowell with your permission and request; don't you know that?

A. No; I didn't request him to appoint Mr. Popescue.

Q. You know he did that?

A. He did that. [141]

Q. You know you wrote a letter to him and you know he wrote a letter doing it and telling Mr. Lofquist about it? A. Yes.

(Testimony of Cash Cole.)

Q. And you know he increased his salary from five or six to eight hundred dollars a month?

A. Yes.

Q. Because he was in charge of everything except the office; isn't that right? A. Yes.

Q. And because you were away; isn't that right?

A. He wasn't doing anything I did.

Q. Who was doing the work that you did?

A. He was doing all the mechanical work.

Q. Who was doing the work you would have done if you had been there?

A. It was handled in the office.

Q. By whom? A. Mrs. Scott.

Q. Did you raise her salary?

A. I raised her salary to \$400 a month and an apartment.

Q. Because you were away?

A. No; just because the hall women were getting almost as much as she was and the firemen were getting [142] \$500 and an apartment.

Q. After five months you came back to Fairbanks? A. A little less than five months.

Q. Did you stop in Seattle on the way back?

A. Yes.

Q. For how long? A. Oh, for days.

Q. Can you tell me?

A. I was in Seattle March 16th. That is when we met at the bank with McAdams.

Q. How long did you stay there then? Until May? A. I stayed there until May.

Q. In Seattle. During this five-month period that

(Testimony of Cash Cole.)

you were away did Mr. Nowell come up here and manage the apartment?

A. I couldn't tell you, as a matter of fact, what time he was here.

Q. You do know, though, don't you?

A. I tell you I don't know. He was up here and I know he changed Mr. Popescue and I was in California and I don't know where he was.

Q. Let me refresh your recollection a little bit. You know he came up here for two or three days when he put Mr. Popescue in charge, don't you?

A. I don't know how long he was there. [143]

Q. You know he didn't come up here and stay for two or three months or five months while you were gone? A. No.

Q. You know that? A. I know that.

The Court: I think this would be a good time to quit for the evening.

Mr. Diamond: All right.

The Court: Adjourn until tomorrow morning at 10:00 o'clock.

The Clerk: Court is adjourned until tomorrow morning at 10:00 o'clock.

The Clerk: Court is adjourned until tomorrow morning at 10:00.

(Thereupon, at 5:05 p.m., October 5, 1953, an adjournment was taken to 10:00 a.m., October 6, 1953.)

* * *

October 6, 1953

Be It Remembered, that the trial of this cause was resumed at 10:00 a.m., October 6, 1953, plaintiffs and defendants represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding. [144]

The Clerk: Court is now in session.

Mr. Jaureguy: If your Honor please, I regret to advise the Court that Mr. Cash Cole, who was on the witness stand when we adjourned had a heart attack last night and will not be able to appear for further examination. For the same reason Mrs. Ruth Cole will not be able to respond to a subpoena.

The Court: Do counsel have any plan or anything to remark about at present?

Mr. Diamond: I don't know what counsel has in mind.

Can you tell us, is there any chance of Mr. Cole coming back while the trial is on, some time during the trial?

Mr. Jaureguy: As far as I can advise, and I can only give a layman's opinion and I don't doubt but what there are many laymen in the courtroom that know more about it than I do, he had a severe heart attack. I am advised this is not the first heart attack he has had. As a layman I would say the possibilities are he will not be able to appear in Court or elsewhere or be able to give testimony either in Court or otherwise for quite some considerable time, if at all.

The Court: There must be other witnesses that we can proceed with. [145]

Mr. Diamond: We have, your Honor, but I am concerned with this proposition that if Mr. Cole is not going to be here for the finishing of the examination, is counsel willing to go ahead and try the case and complete it even though Mr. Cole does not show as a witness for the defendant, or will counsel ask for a continuance because of his illness?

The question is that I hesitate about going ahead with our case and not be able to finish our case and then having counsel ask for a continuance or some delay at the end for Mr. Cole and we will not have accomplished anything. We will have an indefinite delay or an indefinite continuance.

The Court: I can state right here that I don't favor granting a continuance on just an oral statement of counsel. I think they should have the affidavit of a doctor, a practicing physician, to that effect, rather than to just take your statement for it.

Mr. Jaureguy: Yes, I understand. I am not asking for a continuance. As I understand Mr. Diamond's problem, though, is that perhaps when he gets through with his case we will ask for a continuance.

The Court: Yes.

Mr. Jaureguy: With respect to that, we have had no opportunity to consider anything of that kind either [146] pro or con. I don't want to give any assurance of that, I wish I could, but at this moment I do not feel I am in position to give any assurances. I personally have not had an opportunity to talk to Mr. Cole. I have serious doubts if within 48 hours I will speak to him on any subject

whatsoever. So any decision along that line would have to be made, if at all, by my associate and myself, so that I am not in position to assure counsel that I will or will not as matters progress ask for a continuance, but I can assure your Honor if I do it will be by a certificate or affidavit of a doctor.

The Court: You have not talked to the doctor yourself?

Mr. Jaureguy: No, I have not talked to the doctor. The doctor had left when I arrived at Mr. Cole's apartment. I have in the courtroom a man who was—no I am mistaken on that. I don't know whether he talked to the doctor or not. No, I don't think there is anybody in the courtroom that talked to the doctor.

The Court: I think there should be an affidavit of the doctor.

Mr. Jaureguy: As I say, I am not asking for a continuance.

The Court: You are ready to go ahead, [147] then?

Mr. Jaureguy: I will do just as counsel desires in that respect.

The Court: Now, if you like, I can adjourn the case until 2:00 o'clock this afternoon. In the meantime you can decide what you want to do.

Mr. Diamond: If the Court please, I feel that if we go ahead counsel should advise us that we can go ahead and complete the case whether or not Mr. Cole becomes available for this trial. If not, then I think counsel ought to ask for a continuance now, because I don't think we should be put in a position

—I am unable to complete my examination for our case but if I know that we can complete it anyway I will forego that by reason of the expense that we have incurred, the people that are here, and we will go ahead without it if we can be sure we can wind this case up.

Mr. Jaureguy: I can understand your concern about your problem but I will repeat that I will not now under the present stress of circumstances commit the defendants as to whether or not they will ask for a continuance. I am not saying that I can't make an assurance at 2:00 o'clock. I am saying under the stress of circumstances now and absolute inability to speak to Mr. Cole or talk to others that are close to him that could express an opinion, I cannot and will not commit myself at this [148] moment nor will my associate, I am sure.

Mr. Diamond: I wonder if counsel thinks that perhaps by 2:00 o'clock we could have something definite.

Mr. Jaureguy: I think if we could have an adjournment until 2:00 o'clock we could have a conference and discuss things and maybe we could work out a program.

Mr. Diamond: Could we perhaps adjourn for a shorter period of time, say, 11:00 o'clock, or at least have permission to contact the Court and the lawyers with reference to this matter this morning?

The Court: I will continue the case until 2:00 o'clock and if in the meantime you arrive at a conclusion and want to start sooner than two, I will be available anyway at that time on short notice.

Mr. Diamond: Thank you, your Honor.

Mr. Jaureguy: And I suppose your Honor would be available if we had some other type of program we wanted to consult your Honor on?

The Court: Yes, I will be right here ready.

Mr. Jaureguy: Very well, thank you.

The Court: Court is adjourned until 2:00 o'clock.

The Clerk: Court is recessed until 2:00 o'clock.

(Thereupon an adjournment was taken until 2:00 o'clock of the same day.) [149]

(Thereupon, at 2:00 p.m., the court reconvened, pursuant to the recess.)

The Clerk: Court is reconvened.

Mr. Sczudlo: May it please the Court——

The Court: Mr. Sczudlo.

Mr. Sczudlo: In connection with this case, that is, the trial before the Court, both parties would ask for a recess for another half hour, until 2:30. They are still talking the possibilities of going ahead with the trial or continuing it indefinitely.

I would like the indulgence of the Court for another half hour.

The Court: Do you think that is sufficient?

Mr. Sczudlo: If they don't determine it in the next half hour they will either come in and ask the court to continue it until tomorrow or the day after, when perhaps Mr. Cash Cole can be contacted.

There is also some discussion going on concerning settlement, but nothing definite, so if the Court would indulge them another half hour it would be appreciated.

The Court: Very well, we will set it up for half an hour.

The Clerk: Court is recessed until two-thirty.

Mr. Sczudlo: Thank you, sir.

(Thereupon a half-hour recess was [150] taken.)

(Court reconvened at 2:30 p.m., pursuant to the recess.)

The Clerk: Court is reconvened.

The Court: Mr. Sczudlo.

Mr. Sczudlo: May it please the Court, the parties are still continuing their negotiations and have not come to a conclusion, and with the permission of the Court have agreed to a continuance until Thursday morning at ten o'clock, at which time they hope to have a definite report to the Court whether or not they can go ahead with the trial or whether they will have settled this particular case.

The Court: Ten o'clock Thursday.

Mr. Sczudlo: Thursday morning.

The Court: All right.

Mr. Sczudlo: We have two witnesses that the Court instructed to come back today, Mr. and Mrs. Scott. We would like to have the Court instruct them to come back at ten o'clock Thursday morning.

The Court: Very well, the witnesses are instructed to come back at ten o'clock on Thursday morning.

Mr. Sczudlo: Thank you very much.

The Court: All right.

The Clerk: Court is adjourned.

(Thereupon, at 2:35, the trial of this cause was adjourned until 10:00 a.m., Thursday, October 8, 1953.) [151]

October 8, 1953

Be it Remembered, that the trial of Cause No. 7298 was resumed at 2:00 p.m., plaintiffs and defendants represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Clerk: Court is reconvened.

The Court: This was the time set for trial of Cause No. 7298, Fairbanks Development, Incorporated, against Cash Cole.

Are the parties ready?

Mr. Diamond: The plaintiff is ready.

Mr. Jaureguy: I will say for the record, your Honor, we have reached an oral agreement, two or three or more agreements, that have not yet been reduced to writing and as I understand it from Counsel under those circumstances he wishes to proceed with the trial.

The Court: Very well, proceed.

Mr. Diamond: Do we have Ruth Cole?

Mr. Jaureguy: No. If you wish her, we will have her come.

Mr. Diamond: And she has some documents to bring with her.

Mr. Jaureguy: Will you tell her, Counsel says she has some documents she should bring?

The Court will understand that Mrs. Cole, [152] on account of her husband's condition and also because she didn't realize we were going to trial,

didn't appear, although she was under subpoena, and so she will be sent for.

The Court: Very well.

Mr. Diamond: If the Court please, at this time I would like to move for the appointment of a temporary receiver in this matter and for a continuance of this case, joint motions, until such time as Mr. Cash Cole, one of the defendants, can be present and complete his testimony on behalf of the plaintiff.

We have an affidavit which has been filed here by the defendant stating that Mr. Cole is ill and unable to resume the witness stand to complete the testimony on behalf of the plaintiff in this case.

The affidavit indicates that we don't know when he will be able to be available and we feel that we should under those circumstances be entitled, under the record of this case, to the appointment of a temporary receiver to take over the management and operation of this property until we can go ahead with the regular procedure in the trial of this action with all the testimony.

The evidence shows and the affidavit by the doctor that Mr. Cole is unable to be around and he can't manage [153] the property. He can't testify here and he can't take care of the property either. We need somebody to take charge of that property. We need the testimony of Mr. Cole as our case and we are entitled to have his testimony here. Undoubtedly the defendants are going to require his testimony.

I have made an offer that I would proceed with the testimony in this case to bring the trial to a conclusion and forego the testimony which I do require

from Mr. Cole, if he can't be here, with the understanding that upon the completion of all of the testimony in this case, if Mr. Cole can't be here the case will be submitted and completed.

I am unwilling, however, to go ahead with the trial and after the conclusion of all of our testimony and all of the case have counsel make a motion for a continuance and state that he has had no opportunity to examine or cross-examine in connection with the testimony of Mr. Cole or to state that Mr. Cole is a defendant, can't be here through illness, no fault of his own, and therefore should have a continuance.

It places an undue burden upon us; if counsel is going to insist on the testimony of Cash Cole, then we are going to insist upon the testimony of Cash Cole, and we ask that we be given the right or have the Court [154] appoint some disinterested party to look after and manage this property during the incapacity of Mr. Cole and during the pendency of this trial so that it can be properly looked after.

Your Honor knows that there are many affidavits in connection with the appointment of a temporary receiver in this case in the file.

Your Honor has heard the testimony so far in connection with this application. Your Honor knows that the party that has been acting as the manager, Mr. Cole, is ill, is in bed, is unable to even answer questions in the courtroom. If he is unable to do that, he is unable to manage the property.

Your Honor is familiar with the testimony in this case that Mr. Cash Cole has been taking prop-

erty from the corporation which rightfully belongs to the corporation and has wrongfully appropriated that property for his own good and use. To permit that situation to continue would be wrong to the corporation and to the stockholders of the corporation. I think therefore that we should have a temporary receiver appointed in this case and the case continued until Mr. Cole can appear and testify.

Mr. Jaureguy: In the first place I regret that I am constrained to remark that it is entirely with great regret that I note that counsel first sends for Mrs. Cole and then after her son has left the door he moves for a continuance, instead of waiting for disposition [155] on the motion for continuance.

We do not join with counsel in any of his motions. We, however, do not object to the granting of his motion for a continuance. He is now attempting to put me in the difficult position that he attempted to put me in Tuesday morning.

I will not commit myself that if they introduce a lot of testimony here about statements made out of court by Cash Cole or of any improper conduct on the part of Cash Cole, I do not commit myself that I will not ask for a continuance until he will have an opportunity to give his side of that story.

On the other hand, I do not commit myself that if they do not introduce that kind of evidence that I will not ask for a continuance. In other words, whether or not I will feel obliged to ask for a continuance depends entirely upon the situation as it exists at the time the plaintiffs rest, so I will not commit myself on that whatever.

I object to the appointment of a receiver. We have a lawsuit going on here. We have settlement negotiations, which I stated to your Honor, and which has not been denied, on which the parties here in this case and other cases have orally agreed on everything, and we are in the process of reducing those agreements to writing. So under those circumstances I think it is [156] entirely out of place.

I would venture to say that unless your Honor has the identity of persons in mind that you might possibly appoint as a receiver, that unless the opposing parties have decided that they don't want this settlement to go through before your Honor picks the receiver we would have the case settled anyway.

The Court: I am with you on this receivership business. I will appoint a receiver.

How much money is that receiver apt to handle? What bond should he have?

Mr. Diamond: I believe there is as much as \$40,000 a month coming into the apartment houses. I would think, though, that a bond for \$25,000 should be required.

The Court: Do you have any suggestions as to who the receiver should be?

Mr. Diamond: I am not familiar up here. I would ask Mr. Sczudlo. Anybody he might know or might suggest would be entirely satisfactory.

The Court: Before you say anything further, I would say that I notice Robert Sheldon has been manager up there during the absence of Mr. Cole at times and if he is here and would take the position, I would feel confident that he would be reliable. [157]

Mr. Diamond: He would be satisfactory to us, your Honor. We have no objection.

The Court: Well, now we will take a few minutes' recess and I will see if I can get in touch with him. We will take a ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

The Clerk: Court is reconvened.

The Court: I have gotten in touch with Mr. Sheldon and he will accept and the bonding company will be ready to sign a bond within a few minutes. Will you prepare the bond?

Mr. Diamond: Yes, we will take care of the preparation of the necessary bond and the order.

The Court: What would that cost of bond come out of?

Mr. Diamond: Fairview Development will take care of it.

The Court: It comes out of the Fairview Development Company?

Mr. Diamond: Yes, that is correct.

The Court: In the first place?

Mr. Diamond: Yes, that will be a proper expenditure. [158] I assume your Honor is granting the motion to continue the case until Mr. Cole can be available?

The Court: Your other motion was that you wanted to go ahead now, wasn't it?

Mr. Diamond: I put it both ways. If the Court granted the motion to appoint a receiver, then the matter could be delayed until Mr. Cole could return and testify, and I think that would probably be the

proper procedure, unless counsel is agreeable to concluding the case entirely without the testimony of Mr. Cole, but I think Mr. Cole's testimony, as I stated, is proper for our case. It is also proper for theirs, and I think the case should be continued until Mr. Cole can appear and testify.

Mr. Jaureguy: While I think it is unnecessary under the Federal practice, your Honor understands that I save an exception to the order of the Court appointing a receiver.

The Court: Very well.

If that is what you want, then, is to continue the case, vacate this setting—

Mr. Diamond: Might I make one further request, if your Honor please? I have one witness that will not take very long and may be lost at a later date when the trial does come up. The witness is here, and I would like [159] to take that testimony so that it will be preserved for the trial when it is continued.

Mr. Jaureguy: I would have no objection, but I wish counsel would definitely state whether he wants Ruth Cole here today.

Mr. Diamond: No, as long as the case is being continued, Ruth Cole will not have to be here.

Mr. Jaureguy: I think she is on her way.

Mr. Diamond: You could call and cancel that. Then I will call Mrs. Scott, if you will come forward, please, and be sworn.

MRS. ARNOLDINE SCOTT

a witness called by the plaintiffs, was duly sworn and testified as follows:

Direct Examination

By Mr. Diamond:

Q. Mrs. Scott, will you state your name, please?

A. Arnoldine Scott.

Q. Where do you live, Mrs. Scott?

A. At present we are living at 1023 First Avenue.

Q. And you are married?

A. That is right. [160]

Q. Your husband is here in the courtroom?

A. Yes, he is.

Q. Mrs. Scott, you were connected with the Fairview Manor—Fairview Development Company—in some manner, were you? A. Yes.

Q. What was your position?

A. Cashier and bookkeeper.

Q. And for how long did you occupy that position? A. From August, 1951.

Q. Until when?

A. Until September 15, 1953.

Q. You just recently severed your connection with that company? A. That is right.

Q. Just what were your duties as bookkeeper in connection with the company?

A. Keeping all books of Fairview Manor and collecting rents.

Q. What has been your past experience as a

(Testimony of Mrs. Arnoldine Scott.)

bookkeeper? Have you had any experience as a bookkeeper?

A. Yes, I worked for six years for [161] Investors' Syndicate in Minneapolis, as assistant to the controller.

Q. Were you familiar with all of the books of account and the records of Fairview Development Company? A. Yes.

Q. Mr. Lofquist of Seattle was the certified public accountant? A. Yes.

Q. But you did all of the detail work for the corporation? A. That is correct.

Q. Under his general supervision?

A. Yes.

Q. Now, Mrs. Scott, do you know of some parts being purchased for a White truck belonging to Tom Cole? A. Yes.

Q. They were paid for by whom?

A. They were paid for by Fairview Development, Incorporated.

Q. Fairview funds.

Mrs. Scott, you stated that those parts were paid for by Fairview Development Company?

A. Yes. [162]

Q. They were parts for the White truck owned by Tom Cole? A. Yes.

Q. Was that truck used for business of the corporation? A. Not that I know of.

Q. To what account were the parts charged of the Fairview Development Company?

A. They were charged to automotive repair.

(Testimony of Mrs. Arnoldine Scott.)

Q. Mrs. Scott, do you know of an airplane ticket expense to Kansas or some place that was charged to Fairview Development Company?

A. Yes.

Q. Will you tell us what that is?

A. It was the plane ticket purchased for Candace Cole.

Q. Candace Cole is the wife of whom?

A. She is Tom Cole's wife.

Q. And this plane ticket was purchased for her and a ticket to where?

A. It was a ticket to Kansas City, I believe.

Q. And return? A. Yes.

Q. Do you remember the amount of that [163] ticket?

A. It was somewhere in the neighborhood of five hundred dollars.

Q. And what account was that charged to?

A. That was charged to manager's expense.

Q. Did she go back to Kansas on company business or corporation business?

A. Not that I know of.

Q. Was there any company or corporation business that you know of in Kansas? A. No.

Q. Mrs. Scott, don't you know that she went back there in connection with some illness in the family?

A. I believe that her mother was ill.

Q. Now, Mrs. Scott, were there some Christmas presents purchased and paid for by Fairview Development Company?

(Testimony of Mrs. Arnoldine Scott.)

A. I believe that there was one or two.

Q. Paid for by the corporation? A. Yes.

Q. Can you tell us what those presents were, who got them and how much they cost?

A. I don't exactly remember the cost, but one was a present for Mr. Rushlight and one was a present to Jim Cole. [164]

Q. Jim Cole is the other son of Cash Cole, is he not? A. Yes.

Q. Can you tell us approximately what they cost?

A. I believe that the present to Mr. Rushlight was some place in the neighborhood of thirty or thirty-five dollars.

Q. Do you remember what it was?

A. I think that Mrs. Cole told me it was a picture.

Q. And what was the other present?

A. It was a hassock.

The Court: It was what?

The Witness: A hassock.

Q. (By Mr. Diamond): A kind of footstool?

A. Yes, that is right.

Q. Could you tell me what that was charged to in the Fairview books?

A. I can't remember what account it was charged to.

Q. Were these expenses charged to the regular operating expenses of Fairview Development? [165]

A. Yes, they were.

Q. Were there some telephone calls made to

(Testimony of Mrs. Arnoldine Scott.)

Washington, D. C.?

A. I believe there was one.

Q. Was that company business or personal business of Cash Cole?

A. As far as I know it was personal.

Q. The furniture and household things that are in Mr. and Mrs. Cash Cole's apartment are owned by or were paid for, rather, by the corporation?

A. Some of them were, yes.

Q. Can you tell us the kind of things that were paid for by the corporation?

A. Well, the davenport, chairs, tables.

Q. Linen? A. Linens, yes.

Q. Silver? A. Yes.

Q. Such things as napkins, knives, and forks, and things of that sort? A. Yes.

Q. Do you remember the amount of furniture that was paid for in this apartment by the corporation?

A. I think it was some place around [166] thirty-five or thirty-six hundred dollars.

Q. What about the furniture in Mr. Everett Nowell's apartment? Who paid for that?

A. Fairview paid for that.

Q. Do you remember about how much?

A. I think that was around \$2,900 or three thousand dollars.

Q. That included carpets? A. Yes.

Q. Dishes? A. Yes.

Q. In addition to that, was a bar built in Mr. Nowell's apartment? A. Yes.

(Testimony of Mrs. Arnoldine Scott.)

Q. Or was that a coffee table?

A. Well, it was a counter, a breakfast counter or bar.

Q. And about how much did that cost?

A. It was some place around four hundred.

Q. Dollars? A. Dollars.

Q. That was paid as an expense of the corporation? A. Yes. [167]

Q. How often did Mr. Nowell occupy himself in that apartment?

A. Well, he did—I don't know how many times he came up here, but he would spend two or three days, sometimes a week.

Q. And about how many times was he up here, every month?

A. No. Sometimes he would come up twice a month and sometimes he wouldn't come up during the month.

Q. How much part did Mr. Nowell, so far as you know, play in the management and direction of employees or management of the project?

Mr. Jaureguy: I object to that as not within the personal knowledge of the witness.

Mr. Diamond: So far as you know.

The Court: Objection overruled.

A. Well, as far as I know, he took care of quite a bit of business in Seattle.

Q. (By Mr. Diamond): How about up here?

A. Well, when he was up here he helped take care of the management.

(Testimony of Mrs. Arnoldine Scott.)

Q. Now, Mr. Cole made some trips down to [168] Seattle and Portland, didn't he? A. Yes.

Q. And also down to California? A. Yes.

Q. Also made at least one trip to Washington, D. C., didn't he? A. I believe that he did.

Q. The expenses for those trips were paid by Fairview, were they not?

A. The trip to Washington, D. C. wasn't.

Q. He paid that himself? A. Yes.

Q. How about the other trips?

A. Well, as far as I know, the trip to California, the expenses while they were down there, were paid for by Mr. Cole.

Q. You mean the fare from Seattle down or the living expenses when he was down there?

A. The living expenses were paid for by himself.

Q. Did you hear Mr. Cole testify the other day those were charged to Fairview?

A. No, I didn't.

Q. When Mr. Cole went down to Portland, I ask you if you know whether he did some business in connection [169] with the Mooreland Construction Company or the new project across the way?

Mr. Jaureguy: I object to that as hearsay, if your Honor please.

The Court: I think you should reframe your question.

Mr. Diamond: I think you are right, your Honor.

The Court: Objection sustained.

(Testimony of Mrs. Arnoldine Scott.)

Q. (By Mr. Diamond): Mrs. Scott, after Mr. Cole returned from a trip to Seattle and Portland, did he discuss with you any matters or make any statements in connection with the new construction he was planning across the street from Fairview?

A. No, he didn't.

Q. Didn't you know that he was working out a deal across the highway for an apartment house?

A. Yes, I did.

Q. Did you learn that from him?

A. Not directly from Mr. Cole.

Q. Where did you learn that?

A. Well, as far as I can remember, I believe it was through Mrs. Cole. [170]

Q. Tell me whether or not you know if he went to Portland in connection with that project.

Mr. Jaureguy: Same objection.

Mr. Diamond: Answer yes or no, whether you know.

Mr. Jaureguy: Same objection.

The Court: I will sustain the objection.

Q. (By Mr. Diamond): Mrs. Scott, were you there when the maintenance building on the Fairview property was moved across the highway to the new project? A. Yes, I was.

Q. Was anything ever set up on the books to pay rent for the use of that maintenance building?

A. No.

Q. Did you ever hear any discussion about paying rent for that maintenance building?

A. No, I didn't.

(Testimony of Mrs. Arnoldine Scott.)

Q. Mrs. Scott, you remember when you were told that Mr. Nowell was no longer on the payroll?

A. Well, I had a check made out for him and Mr. Cole told me not to send it.

Q. Did he tell you why?

A. That Fairview couldn't afford it. [171]

Q. Did he tell you whether or not Mr. Nowell was to receive any more salary payments?

A. We sent one check for five hundred.

Q. When was that?

A. I believe that was in March or April.

Q. That was a number of months later?

A. Yes.

Q. But at the time when he stopped you from making the payments you had previously been making, what did he say as the reason and as to how long it would go on and what about it?

A. He made no comment as to how long it would go on.

Q. At that time did Mr. Cole tell you that Mr. Nowell did nothing to earn that salary any way?

A. I can't remember him saying anything like that.

Q. Mrs. Scott, there was installed in the project a blower system for disposing of ashes by Mr. Cole. Do you know about that? A. Yes.

Q. Do you remember about how much it cost?

A. Well, the ash conveyor and coal conveyor, I believe that came to some place in the neighborhood of \$15,000. [172]

(Testimony of Mrs. Arnoldine Scott.)

Q. Can you divide that between the ash conveyor and the coal conveyor?

A. No, all the work was done together.

Q. The ash conveyor was never very satisfactory, was it?

Mr. Jaureguy: I object to that as a leading question. He is asking too many leading questions.

Mr. Diamond: I will withdraw it.

The Court: Very well.

Q. (By Mr. Diamond): Mrs. Scott, I ask you whether or not the apartment house continued to use the ash conveyor after it was installed?

A. As far as I know, it is in use now.

Q. Did they use it continually?

A. I really don't know.

Q. Do you know whether or not it was used when Mr. Popescue was in charge of the operation? A. No, I don't.

Q. You mentioned the five hundred dollars that was paid to Mr. Nowell in March or some such date, of this year, was it? A. Yes.

Q. What were the circumstances of that [173] payment?

A. Jim Cole came in and told me that he had talked to his father and that we should make out a check for five hundred dollars for Everett Nowell.

Q. What did you charge it to on the books of the corporation? A. Manager fee.

Q. What period of time did it cover?

A. I really don't know what it was supposed to cover.

(Testimony of Mrs. Arnoldine Scott.)

Q. Do you recall some work being done in connection with a forced air system for the chimneys on the property? A. Yes.

Q. And who did that work?

A. It was installed by the maintenance men of Fairview.

Q. Was there someone from outside that came up to do some work on it?

A. Mr. Christie came up to draw up the blue-prints.

Q. Where did Mr. Christie come from?

A. He was employed by Rushlight.

Q. What was the nature of this work that he was doing on Fairview?

A. I really don't know too much about the [174] maintenance part of it.

Q. Do you know whether or not that forced air system is being used?

A. As far as I know, it isn't.

Q. Do you know whether or not it was ever used? A. It was used, yes.

Q. It was only installed on one building, was it not?

A. That is right, Building No. 4.

Q. And used for a short time?

A. I don't know how long it was used.

Q. Sufficient equipment was purchased for all four buildings, though, wasn't it?

A. I believe so.

Q. Never has been installed on the other three?

A. No.

(Testimony of Mrs. Arnoldine Scott.)

Q. Do you recall the incident when Jim Cole was fired or left the employ, rather?

A. Only through Jim Cole.

Q. Did you ever talk to Mrs. Cole about it?

A. No, I didn't.

Q. I don't think you can tell me what Jim Cole said, so I won't ask you. [175]

Do you recall Mr. Campbell from the Seattle Trust and Savings Bank coming up and making an investigation of the books and records of Fairview?

A. Yes.

Q. Was Cash Cole present in Fairbanks at that time? A. No.

Q. Who did Mr. Campbell talk to?

A. Jim Cole and myself.

Q. Did he also talk to Mrs. Jim Cole?

A. Yes—well, when we were present, he didn't.

Q. But he did at some other time?

A. That is what I have heard, yes.

Mr. Jaureguy: What is that? I didn't get that question and answer.

Mr. Diamond: That is what she has heard, that he talked to her at some other time.

Q. (By Mr. Diamond): Do you know whether or not that visit of Mr. Campbell's up here in connection with that had anything to do with Mr. Jim Cole's employment being terminated?

Mr. Jaureguy: I object to that on the ground that it is based on hearsay. [176]

Mr. Diamond: I asked if she knows. Answer yes or no.

(Testimony of Mrs. Arnoldine Scott.)

Mr. Jaureguy: I submit, your Honor, that is no answer to the objection.

The Court: I will sustain the objection. I think you can frame it so it won't be leading.

Mr. Diamond: Yes.

Q. (By Mr. Diamond): Do you know anything about a shipment of personal effects consigned to Cash Cole on March 30, 1953? A. Yes.

Q. Can you tell us what that is?

A. It was a shipment of their dishes and pictures.

Q. It was shipped up here in 1953?

A. Yes.

Q. Who paid the freight costs for shipping that household goods here?

A. It was charged to Fairview.

Q. To what account in Fairview?

A. I don't remember what that was.

Q. Was it charged as an expense of Fairview?

A. Yes.

Q. Do you remember about the cost of that freight [177] bill? A. No, I don't.

Q. If I suggested it was somewhere around \$322.90, would that be about right? Would that refresh your recollection?

Mr. Jaureguy: I object to the leading question.

The Court: Objection sustained.

Q. (By Mr. Diamond): Can you approximate the cost of it?

A. Well, I know that it was quite a bit. I don't remember the amount.

Q. Mrs. Scott, do you recall on one occasion

(Testimony of Mrs. Arnoldine Scott.)
when Mr. Cole was away for approximately five months, just a little short of that, outside?

Mr. Jaureguy: I object to that as a leading question.

The Court: I will overrule it or I will permit it, rather, under the conditions.

A. Yes, I do.

Q. (By Mr. Diamond): Can you tell us whether or not Mr. Cole got paid \$1,000 a month during that period of time he was away? A. Yes.

Q. Was he away on other occasions, too? [178]

A. He was gone this year for around three months.

Q. Was that sometime in April to August?

Mr. Jaureguy: Did you say April to August?

Mr. Diamond: April to August.

Mr. Jaureguy: I object to it as a leading question.

Mr. Diamond: I will reframe the question. I don't think it is proper.

The Court: Yes.

Q. (By Mr. Diamond): Did Mr. Cole get paid \$1,000 a month during those three months that he was away? A. Yes.

Q. Do you know where he was all that time?

A. I believe that he was in Seattle.

Q. Do you know whether or not he was in Portland? A. No, I don't.

Q. Can you tell us approximately when that occurred?

A. He was gone during May and June, I think.

(Testimony of Mrs. Arnoldine Scott.)

Q. Do you know whether or not the Fairview Development was charged for two electric [179] blankets? A. Yes.

Q. As an expense of the corporation?

A. Yes.

Q. What became of them?

A. They are in Mr. Nowell's apartment.

Q. Mrs. Scott, I ask you if you know whether or not Morrissey, Eagan & Walsh in Seattle were paid any money by the corporation?

A. I think that they were.

Q. You don't recall the amounts of the payments that were made? A. Not exactly.

Mr. Diamond: Mr. Jaureguy, I assume the books are still not here in the courtrooom. They aren't here, are they?

Mr. Jaureguy: No. They are in the office of the company.

Q. (By Mr. Diamond): Can you tell me what that law firm did for the corporation?

A. I don't know. The statement just read "For services rendered."

Q. Do you know whether or not anything was paid to Sam Wright or the firm of Wright, Boothe and Beresford in Seattle? [180]

A. Yes, there was an amount paid to them.

Q. Do you remember that amount?

A. No, I don't.

Q. Was there anything ever paid to my law firm, Lycette, Diamond & Sylvester? A. No.

(Testimony of Mrs. Arnoldine Scott.)

Q. Mrs. Scott, do you know anything about Mr. Cole being bonded in connection with his job?

A. No, I don't.

Mr. Diamond: That is all. You may inquire.

Cross-Examination

By Mr. Jaureguy:

Q. Mrs. Scott, you have testified about several charges made on the books of the corporation which apparently from your description were for personal purposes of individuals.

Do you know anything about reimbursement to the corporation for any of those charges?

A. Well, some of them have been paid back.

Q. Could you tell us which ones have been paid back? Would it be easier if I named them one at a time? A. Would you do that, please?

Q. Yes, certainly. [181]

The parts for a truck you said were charged to automotive repairs. Was there reimbursement for that?

A. There was a partial reimbursement at the time I left.

Q. And how long before you left was that reimbursement?

A. Oh, I would say about three weeks.

Q. How long after the parts were purchased was that reimbursement made?

A. It was about a month, I think.

Q. Do you know whether the corporation has yet paid for those parts?

(Testimony of Mrs. Arnoldine Scott.)

A. Yes, the corporation has.

Q. Now, what about the airplane trip for Tom Cole's wife, do you know whether there was reimbursement for that?

A. There was a partial reimbursement.

Q. And do you know what that partial reimbursement consisted of? What was the extent of the partial reimbursement?

A. I really couldn't say offhand.

Q. Would you say it was the major portion of it, or would you know? [182]

A. No, it wasn't.

Q. Do you know whether or not Mr. Cole has any business with any Governmental agency in Washington, D. C.—I mean business for the corporation?

A. Well, he probably would have with F.H.A.

Q. Do you know whether the telephone call or calls that you referred to were in connection with that business? A. No, I don't.

Q. I better get back to this man Rushlight. That picture that was given him, do you know whether there has been any reimbursement for that?

A. So far as I know, there wasn't.

Q. And the footstool for Jim?

A. I don't believe that there was on that.

Q. Have you any reason to believe that when Mr. Cole was in Seattle or Portland, that he wasn't performing services on behalf of the corporation?

A. No.

Q. This maintenance building, that, as I understand it, was moved across the street to the Moore-

(Testimony of Mrs. Arnoldine Scott.)
land Court premises? A. Yes.

Q. How long before you left was that move made? [183]

A. It was about two or three days before I left.

Q. Two or three days before you left. Now, when you would make these charges with respect to these various amounts that you testified to, was there somebody that told you where to make the charges, or was that your responsibility to determine that?

A. On these items that were charged on the truck I asked Jim Cole what I should do with them and he told me to charge them to automotive repair.

Q. Was Jim Cole there when you made those?

A. Yes.

Q. How long ago were those repairs made?

A. Jim Cole left in June.

Q. They were made before that?

A. They were made prior, yes.

Q. Mrs. Scott, you have referred to a blower system and ash disposal system.

Do you know what the purpose of those systems was? I think they put in a blower system, didn't they, and a conveyor system and also some chimneys? A. Yes.

Q. Do you know what the purpose of doing that work was? [184]

A. The blower system was to cut down on the coal expenses and to make the boilers work better.

Q. Do you know how the boilers worked before that system was put in?

A. No, I really don't.

(Testimony of Mrs. Arnoldine Scott.)

Q. Do you know whether it improved the boiler and furnace systems?

A. Well, only through what I overheard the men talking about.

Q. And who was it you heard?

A. Jim Cole and Tom Cole and Elmer Miller.

Q. As I understand, the blower system is still there? A. As far as I know it is.

Q. At least it was there when you left?

A. Yes.

Q. And during all the time you were there?

A. Yes.

Q. The same with the conveyor system?

A. Yes.

Q. Could you give us some kind of a description of what that consisted of?

A. One of them was to—the coal conveyor was to bring the coal from the coal bin and feed it into the stoker, and the ash conveyor was to convey the ashes from [185] the furnace across the road in the back of Fairview.

Q. Prior to the time they got those conveyor systems, how did they convey the coal into the furnaces and the ashes out of the furnaces?

A. The men did it by hand.

Q. That is with buckets? A. Yes.

Q. And the furnaces are down in the basement some distance below the street, aren't they?

A. Yes.

Q. And the men have to go quite some distance through the basement from the street in order to get to the furnace room; that is correct, isn't it?

(Testimony of Mrs. Arnoldine Scott.)

A. Yes.

Q. And so with the ashes, they would take a bucket of ashes out of the furnace and go some distance through the basement and go across the street and dump it in the ash can?

A. That is right.

Q. And now it is automatic? A. Yes.

Q. And the coal system is automatic?

A. Yes.

Q. The chimneys they put on, they put all four chimneys on there, one on top of each apartment house; [186] that is correct, is it not?

A. Yes, that is correct.

Q. And as far as you know, they are still there operating? A. Yes.

Q. This truck that these automotive repairs were put on, was that Jim Cole's truck, or was it Tom Cole's truck, or do you know who it belonged to?

A. I believe it belonged to Tom Cole.

Q. Do you know whether that truck has been used for any corporation business for hauling things around for the apartment houses?

A. I don't believe it has been.

Q. I suppose that before you came to testify you talked to the attorneys for the plaintiffs about the testimony? A. No, I haven't.

Q. So that they didn't know what you were going to testify to when you took the stand?

A. No.

Q. Has any of the attorneys spoken to you about coming to testify?

A. Mr. Sczudlo called me and asked me if I

(Testimony of Mrs. Arnoldine Scott.)

would, but I didn't talk to him.

Q. And what did he say when he asked you [187] to come? A. I really don't remember.

Q. Is what you have told us the sum total of what you can remember as to what he said?

A. Yes.

Q. You don't remember anything else he said about it? A. No.

Q. And you didn't talk to any of the attorneys about what your testimony would be?

A. No.

Q. Did you talk with anybody else about what your testimony was going to be?

A. Only my husband.

Q. Just your husband, and nobody else?

A. No.

Mr. Jaureguy: That will be all, thank you.

Mr. Diamond: That is all.

(Witness excused.)

Mr. Diamond: If the Court please, Mr. Sczudlo tells me he has a form of order to present for the appointment of a receiver which will be here in a few minutes.

That is all the testimony I wanted to put on [188] to preserve that for the trial when it resumes.

The Court: Very well. We will take an adjournment until what time?

Mr. Diamond: I would say it will probably be about 15 or 20 minutes. We can call upon the Court when it is completed. We can present the order and have it entered.

The Court: Do you agree to the selection of Mr. Sheldon?

Mr. Diamond: Yes, I have.

The Court: We will take a 15-minute recess and I will be in my chambers if you want to see me before that.

The Clerk: Court is recessed for fifteen minutes.

(A 15-minute recess was taken.)

The Clerk: Court is reconvened.

The Court: Is there anything further to be presented to the Court at this time?

Mr. Sczudlo: If your Honor please, our motion to continue the trial generally is now before the Court until such time as Mr. Cash Cole can return to the stand. In view of the coming jury cases, I think it should be continued generally. [189]

The Court: Very well, the cause is continued generally.

Mr. Jaureguy: I wonder if we can have the accommodation of asking that if any counsel asks to have it come up for trial we can get a week's notice of the application.

Mr. Diamond: I would say: make it reasonable notice.

Mr. Jaureguy: Unless we happen to be in Fairbanks.

Mr. Diamond: Reasonable notice. You didn't want it to come up any faster than that? It might take us more than a week to get ready to come up for the trial.

Mr. Jaureguy: I would say that is the minimum.

Mr. Sczudlo: What you are asking is in the event we want to set a new trial you have at least a week's notice of it?

Mr. Jaureguy: Yes.

Mr. Sczudlo: As a matter of fact, the Court would require a notice to be sent out in writing at least ten days before the trial and then the Court would reset the trial at that time.

The Court: Mr. Clerk, here is the order appointing the receiver. [190]

The Clerk: Very well, sir.

The Court: This cause is adjourned generally.

The Clerk: Yes, sir.

(Thereupon, at 3:40 p.m., October 8, 1953, an adjournment was taken.)

* * *

United States of America,
Territory of Alaska—ss.

I, Esther M. Midthun, do hereby certify that I was the official court reporter on October 5, 6, and 8, 1953, the dates upon which the trial of Cause No. 7298 was had, and that the foregoing transcript, pages 1 to 191, inclusive, constitutes a full, true, and accurate transcript of my shorthand notes taken at the trial in Cause No. 7298.

Dated this 12th day of March, 1954.

/s/ ESTHER M. MIDTHUN.

[Endorsed]: Filed March 15, 1954. [191]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS OF
JUNE 4, 1954

Be It Remembered, that upon the 4th day of June, 1954, the above-entitled cause came on for argument before the Honorable Harry E. Pratt, District Judge.

* * *

The Court: Mr. Sczudlo.

Mr. Sczudlo: Yes, sir.

The Court: I believe your matter was first.

Mr. Sczudlo: May it please the court, this is in the case of Fairview Development, Inc., vs. Cash Cole. We served the counsel for the defendant with notice that we would request the court at this time to set a bond, either a supersedas or a cost bond, or both, or to strike their notice of appeal for failure to file a cost bond. This afternoon, however, or just when I came in the courtroom, the Clerk showed me the file in which a cost bond for \$250 had been filed as of yesterday, but it has not been approved by the court as far as I can tell from the court file.

We feel that the cost bond in this case should be more than \$250. Our brief alone will probably cost that amount, or approximately that amount in the appeal. Likewise, we feel that we should be protected on an additional record we may require. We have no idea at this time what size the record will be or what the appellants are going to request as the record. It has been generally our experience

that we usually have to require an additional record for which we have to pay ourselves until the appeal is over, and such additional record may run anywhere from two hundred fifty dollars to a thousand dollars, so we feel a reasonable cost bond in this particular case, where an extensive record would be involved, should be about a thousand, five [2*] hundred, if we have a corporate surety, or it should be probably twice that amount on individual sureties.

Now, I don't know whether counsel intends to file a supersedas bond in this proceeding or not, but if he does, I think the same order should provide for a supersedas bond, and we feel that in view of the fact that the rental collections at that place are over thirty thousand dollars a month, such a bond should be at least two hundred fifty thousand dollars, if corporate sureties are provided. I don't think we even care to argue the size of the bond in the event of individual sureties. We feel that where bonds of that size are involved, individual sureties are in no position to meet bonds of that size, nor have they ready assets which could be converted to pay under such bond.

If the court please, we feel that a cost bond in this case should be set at fifteen hundred dollars with corporate sureties; that the bond now on file should not be approved; and that a supersedas bond, if one is filed by the appellant, should be set in the sum of two hundred fifty thousand dollars with corporate sureties. I have two or three cases I could cite to the court as to corporate sureties if the court so desires. There are no recent cases on this matter of

sureties. The court is probably familiar with respect to the discretion given to the court where it provides that the sureties shall be approved by the court.

In attempting to check the law on that point, I found an old case, 44 United States 483, in which it held [3] that the judges of the courts are the sole and exclusive judges of the type of security and the amount of security that shall be provided. That is in the case of supersedas bond. It specifically had to do with supersedas bonds. I have not been able to find where this case has ever been reversed or where the Federal Rules have changed that. As a matter of fact, the present rules, Federal Rules confirm the fact that the court will determine the surety and determine the type of surety. I refer specifically to Rule 37(d) and (e).

In the case of *Ray v. Morris*, 170 Federal 2nd, 498, the court stated "An appeal is granted to a losing party on condition that he complies with statute permitting appeal, and appellant must be held to have known of existence of statute, requirements of which are jurisdictional and cannot be avoided." That case, of course, is in point with respect to requiring a cost bond, since the rule states that a cost bond shall be filed at the time that a notice of appeal is filed.

Thank you, sir.

Mr. Taylor: If the court please, the rule provides a cost bond shall be two hundred fifty dollars. That is a flat amount of the cost bond. And in the event of a supersedeas—or in the event of a reversal

of the case, the circuit court can assess further costs against the losing party, but they say first it must be a flat two hundred fifty dollars. [4]

Now, as to the matter of the supersedeas bond, I think the court heretofore stated that the supersedeas bond would be two hundred, and—two hundred thousand dollars. We feel that that, your Honor, is grossly unreasonable in view of the fact that the court has taken the property away from Mr. Cole and placed it in the hands of a stranger, and has only required a fifty thousand dollars bond, your Honor. If one party takes it and only puts a fifty thousand dollar bond up, it would seem only just and equitable that if the other party who has had it in his possession all this time, and who has operated it efficiently and has applied the money on the payment of the fixed charges and the expenses, if he retains it he should only be required to put up a fifty thousand dollar bond.

I think, your Honor, if we are required to put up a two hundred fifty thousand dollar bond, we feel that the receiver should likewise, your Honor, put up a bond in an equal sum. It seems like the equities should be equal in this matter, your Honor, and so far as I know, I don't know whether we would be able to get a bond of two hundred fifty thousand dollars. The court intimated that would be the amount, but we feel that the receiver's bond, your Honor, should be at least equal to the amount that you are requiring the defendant in this case to put up.

The Court: You may—just mind telling us just

us what all matters should be secured by this supersedeas bond? What are the matters? [5]

Mr. Sczudlo: The principal matters that should be secured by the supersedeas bond is the cash that is being collected at the building. That is thirty thousand dollars a month, at least, or more. The appeal will last at least a year, but even if we say ten months that would be three hundred thousand dollars which would be collected and no accounting made for that three hundred thousand dollars as it isn't subject to the court's control.

The Court: How is that money taken care of?

Mr. Sczudlo: In the case of the receiver, the court has specifically directed him to deposit that money in the First National Bank and he is not to draw it out except by check countersigned by the public accountant, Mr. Ray Kohler. On top of that, the court has directed that the receiver give a monthly accounting at the end of each month whereby this court is advised at all times what funds are collected and where they are kept and they cannot be disbursed except by the receiver and Mr. Kohler.

In other words, though there is thirty thousand dollars being collected a month, this court has also required the receiver to put up fifty thousand dollars corporate surety. The court at the end of each month can take the receiver out if he should in any way misappropriate any of the funds so that the argument put up by Mr. Taylor that the receiver should put up as large a bond is not appropriate at this particular time. It has no point here. We have

two [6] different set-ups. In the case of the receiver, he is an official of the court fully under the control of this court at all times. The court has control of all the funds at all times.

The Court: Is there any mortgage on the property?

Mr. Sczudlo: There is a mortgage of approximately three million dollars. That is the balance at the present time on which there has to be paid twenty-one thousand dollars a month, and the receiver has already informed the court that at the time he was appointed the payment for May 1st was in default, and it wasn't until the end of the past—of May that the receiver was able to pay it off because of the mishandling of certain funds in that particular building by the prior management. As a matter of fact, the court even permitted the receiver to borrow five thousand dollars in order to prevent that installment being in default. Now, the same thing is what we would be worried about in the case of a supersedeas.

* * *

The Court: Who is the mortgagee?

Mr. Sczudlo: Institutional Securities Corporation of New York. They are not a party to this case and, of course, the mortgage is secured by the FHA, a government agency, and they have already directed a letter to the receiver requesting them to have an audit made of all the books because they are concerned about the financial condition of the plaintiff corporation in this case.

The Court: Very well. [7]

Mr. Sczudlo: I would like to point out with re-

spect to counsel's statement about the flat bond in the case of a bond on appeal, the provisions of rule 73(d) is as follows: "Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required." The rule specifically provides that the court may fix a larger amount and obviously here where we go to the Ninth Circuit and we do run into extensive expenses for printing briefs and printing the record, a bond of two hundred fifty dollars is hardly sufficient to cover the costs of the opposite party, and we feel that a bond of fifteen hundred is a minimum which should be provided as a cost bond.

As far as the supersedeas bond is concerned, as I pointed out, there are collections of over thirty thousand dollars a month, that is in ten months over three hundred thousand dollars. On top of that, our costs should be secured by a supersedas bond. Also, any profits that may be lost or any misappropriation of funds made during that period, so a bond of two hundred fifty thousand dollars should be a minimum bond, and it should have corporate sureties. At the end of the appeal, if there are losses or damages to the plaintiff, they should be adequately protected [8] especially if the mortgage should go in default and the entire property should be lost during the period of appeal through a foreclosure,

as they were on the verge of doing when the court appointed a receiver.

Mr. Taylor: Your Honor, I object to that last statement as an untruth. The mortgage institution, the Institutional Securities Company, was very well pleased with the management of the corporation by Mr. Cole. The only reason they were in default, your Honor, was the fact that Mr. Sczudlo's clients stole so much of the money in the construction of it, that they had to spend one hundred forty some thousand dollars of the rents to make the place liveable. I just wanted to correct Mr. Sczudlo on that account. It wasn't the inefficiency of Mr. Sczudlo's clients, it was their dishonesty, their stealing of the money from the government that was supposed to go into that building.

Now, Mr. Sczudlo looks at this one point. He says my point is such and such. Is it not proper that if the court directed that Mr. Cole continue in possession of that place up there that he could put the same safeguards around the distribution of the income as he does with Mr. Sheldon. If a fifty thousand dollar supersedeas bond is put up, the court could require Mr. Cole to submit each month a monthly accounting; and the first month that Mr. Sheldon is in office he has to borrow five thousand dollars. Mr. Cole did borrow seven thousand five hundred dollars during the winter, but that [9] was all being caught up, and at this time Mr. Sheldon is operating the place, your Honor, actually he is driving tenants out of there. I have been up there and I know just about what it is, and he is going

to borrow money next month, too, and the Institutional Securities Company have actually a bona fide cause to feel alarmed at the present time under the present management, your Honor.

We feel that fifty thousand dollars is sufficient bond for Mr. Sheldon; that fifty thousand dollars with the same safeguards thrown around the distribution of the money by Mr. Cole would be equitable and fair.

The Court: The court fixes the cost bond at fifteen hundred, a fifteen hundred dollar bond to be given by a company who is justified under the rules of the Treasurer of the United States. Now, then, as a supersedeas bond, I fix that bond at two hundred fifty thousand dollars, bond to be executed by a company that has the approval of the Treasurer of the United States for going on bonds.

Mr. Taylor: Does the court mean that on the cost bond for fifteen hundred you won't recognize sureties with adequate property, your Honor?

The Court: Well, I think so. I think that is what would be the result of it.

Mr. Taylor: It must be a surety company bond.

The Court: Yes.

Mr. Sczudlo: Does the court desire a draft order on that? [10]

The Court: Yes, if you please. You will submit them. Now, let's see. Is there anything else you wanted passed upon? Is that all you wanted passed on at this time?

Mr. Sczudlo: There is another motion pending

in this case with respect to the notice, but I hadn't noticed it for hearing at this time, and I don't know whether Mr. Taylor would care to argue it. It is a motion to strike the name of Fairview Development Company as a party to the notice for appeal. This motion was filed back in May, May 10, 1954, on the same day on which the notice of appeal was filed.

The plaintiff Cash Cole included Fairview Development Company the plaintiff in the case with himself as one of the parties appealing from the court's order. All through this case our office has represented Fairview Development Company. There has never been any substitution of attorneys and the inclusion of Fairview Development Company as a party to the notice for appeal is entirely wrong since we represented them as the plaintiff in the case throughout the proceedings, and they should be stricken from the notice of appeal.

Mr. Taylor: If the court please, I—we can decide that very shortly. At a meeting of the stockholders of the Fairview Development Company, Mr. Bell and I were chosen as attorneys for Fairview Development Company and for Mr. Cole, and the inclusion of the name Fairview Development Company as a defendant, your Honor, is more justified than the inclusion of the Fairview Development Company as the [11] plaintiff because there was no meeting of the Board or no action of the Directors in authorizing the institution of this suit by the Fairview Development Company.

And another thing, your Honor, I don't know whether—I believe they are in evidence, too, the

Articles and the Bylaws of the corporation say that as the stock was held fifty-fifty between the two factions that in case of a dispute they must be submitted to Kenneth Kadow, and in case that he wasn't available to Mr. Sumter who would make the decision, but in no case has it ever been shown that that procedure has been followed here so the inclusion of the Fairview Development Company as a defendant is more justified than the inclusion of Fairview Development Company as the plaintiff, and I think it comes a little late now, your Honor, when it is on appeal for this court to make any changes in that title.

Mr. Sczudlo: I don't understand what Mr. Taylor says, if there is any—that it comes too late to make any changes in the title when he is himself trying to do that. The Fairview Development Company was a party plaintiff right from the beginning of this case, and long before Mr. Bell or Mr. Taylor came into this case. They came into this case as far as I know, only in January of this year, after a final settlement had been made and after a final decree had been entered. They came in to have that settlement upset and the decree reopened. At that time Fairview Development Company was a party plaintiff. They made no effort under [12] the procedures outlined in the statutes of Alaska to question the authority of ourselves to represent those plaintiffs. There is nothing in the record at any time that they questioned our authority as the attorneys for the plaintiff right from the beginning of this case, and it has been pending about a year and

a half or so, so he is attempting at this time to switch the position in connection with the appeal of Fairview Development Company from plaintiff to defendant appealing from a judgment which was rendered in its favor and in favor of the other plaintiffs.

I just don't understand his argument. It is rather ambiguous and confuses me. I think the only proper party to this notice of appeal is Mr. Cash Cole and the Bayview Realty Company against whom the judgment of this court ran. As far as the Fairview Development is concerned, the plaintiff corporation, this was a stockholders' suit which we filed and we filed on behalf of all stockholders who did not agree with the management then in possession. So I feel that the inclusion of Fairview Development Company should be stricken from the notice of appeal because we are their attorneys and we are objecting to them being included in a notice of appeal.

The Court: This is the defendant's notice?

Mr. Sczudlo: That's right, sir. The motion is our own. The plaintiff's motion. We are making the motion on behalf of Fairview Development Company plus the other [13] plaintiffs and asking that the name of Fairview Development be stricken from the notice of appeal where they are brought in as being represented by Mr. Bell and Mr. Taylor. We are objecting to them being included there and we represent them, and we are making this motion on behalf of Fairview Development Company to have its name removed from the notice of appeal.

The Court: Well then the matter will be decided

for the present by an order denying the motion?

Mr. Sczudlo: No, it will be decided by an order allowing the motion, that is, to strike the Fairview Development Company from that notice of appeal.

The Court: Oh, it is to strike it from the notice of appeal?

Mr. Sczudlo: Yes, sir.

The Court: That is what your motion is for? All right, your motion is denied then.

Mr. Sczudlo: The motion is denied, sir, or granted?

The Court: It is granted.

Mr. Sczudlo: May I include that in my draft order with the other, sir?

The Court: Yes.

Mr. Sczudlo: Thank you, sir.

Mr. Taylor: If the court please, in such a decision I believe that the court also should strike Fairview Development Corporation from the title in the plaintiff cause there [14] was no action by anybody that authorized the Fairview Development to bring this action. If it is a stockholders' scrap let them take the stockholders, because there wasn't any way they could break the deadlock as they called it. In fact, they admit in their pleadings there was a deadlock and they couldn't take any action and so failed to follow the procedure of having the arbitrators decide it so Fairview Development should not be a plaintiff if they cannot be a defendant. We move that it be stricken from there and let it be a stockholders' fight.

The Court: Well, there is nothing before the

court at this time. That has been passed on and I see no reason for opening up or rescinding anything I have said.

* * *

United States of America,
Territory of Alaska—ss.

I, Mary F. Templeton, official court reporter for the aforementioned Court, do hereby certify:

That the foregoing pages numbered 1 to 15, inclusive, constitute an accurate transcript of my original shorthand notes of that portion of the oral proceedings had upon the 4th day of June, 1954, in open Court in Cause No. 7298 Civil.

Dated at Fairbanks, Alaska, this 24th day of June, 1954.

/s/ MARY F. TEMPLETON. [15]

[Endorsed]: No. 14424. United States Court of Appeals for the Ninth Circuit. Cash Cole, et al., Appellants, vs. Fairview Development, Inc., et al., Appellees. Supplemental Transcript of Record. Appeal from the United States District Court for the District of Alaska, Fourth Division.

Filed July 12, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

